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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

SAPAG, S.A., PETITIONER,

v.

STANDARD FITTINGS COMPANY,
RESPONDENT.

PETITION BY SAPAG, S.A. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether the exercise of personal jurisdiction over a foreign defendant is constitutionally justified by the fact that the plaintiff, a resident of the forum state, unilaterally chose to secure a letter of credit from a forum bank in favor of the foreign defendant?

II

In a due process analysis of the contacts between the forum state and a foreign defendant, what kind or degree of interest in the controversy must the forum state have before that interest becomes a factor properly supporting the exercise of personal jurisdiction?

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PETITION BY SAPAG, S.A. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, SAPAG, S.A., respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on September 11, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is

reported 625 F.2d 630 (5th Cir. 1980) and a copy thereof appears in Appendix A. The opinion of the United States District Court for the Western District of Louisiana is reported 448 F. Supp. 426 (W.D. La. 1977) and a copy thereof appears in Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 11, 1980. The Order of the United States Court of Appeals for the Fifth Circuit denying SAPAG, S.A.'s Petition for Rehearing En Banc was entered on October 30, 1980. This Court's jurisdiction is invoked under Title 28, Section 1254(1) of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Western District of Louisiana was invoked under Title 28, Section 1332 of the United States Code because the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and the controversy is wholly between a citizen of a state, Standard Fittings Company (Louisiana) and a citizen of a foreign country, SAPAG, S.A. (France).

Respondent Standard Fittings Company (Standard) is engaged in the business of the manufacture, purchase, sale and distribution of high-pressure fittings, valves, unions and other items. Standard maintains and operates a large machine shop and manufacturing plant in Opelousas, Louisiana. On the other hand, Petitioner SAPAG, S.A. (SAPAG) manufactures various types of high-pressure fittings solely at plants which it operates in France. SAPAG

has never qualified or been licensed to do business in the State of Louisiana (R. 107-111).

In February, 1974, Irwin H. Davlin, representing Standard as its President and General Manager, visited France to investigate the possibility of purchasing some high-pressure fittings from SAPAG. Following a visit to the SAPAG main office in Paris, and its plant in Blois, France, Mr. Davlin initiated the discussion of a possible business relationship between Standard and SAPAG, which discussions culminated in an informal handwritten statement of intent, dated February 19, 1974, written and signed by Mr. Davlin while having dinner in a restaurant in Blois, France, with representatives of SAPAG. (R.12-15; R.107-111.)

According to the document of February 19, 1974 (R.12-15), which is really nothing more than some notes of a meeting stating that at some date in the future, conditioned upon agreement as to

quantity, price, delivery dates, product availability and market or economic conditions, Standard and SAPAG agreed to see if a long-range relationship could be developed whereby at some future date Standard might be given an exclusive North American distributorship for SAPAG products.

If such a future agreement were consumated, high-pressure fittings could be shipped on an individual order basis by SAPAG to destinations requested by Standard, C.I.F. Dockside in New York, New York, or Houston, Texas, at which point(s) title and control would pass to Standard. Any SAPAG products that might be purchased by Standard would be distributed and resold by Standard solely at Standard's discretion. (R.107-111.)

Additionally, Standard was to secure a letter of credit in favor of SAPAG. But, Standard was not required to obtain the letter of credit from any particular bank. On the contrary, the

selection of the bank was left solely to Standard's discretion (R.138).

The February 19, 1974 document, paragraph 16 (R.15), provides as follows:

> The general purpcse of this agreement is to develop a relationship whereby Standard or its assignee shall be exclusive North American distributor for SAPAG. SAPAG shall diligently attempt to meet shipping schedules as necessary to Standard. SAPAG guarantees the quality of its products. Standard shall do its best efforts to sell the described output of SAPAG. The agreement is premised on being renewed annually provided each of the parties shall have performed satisfactorily.

On September 11, 1974, Mr. Davlin of Louisiana made another trip on behalf of Standard and at Standard's expense, to France, visiting the SAPAG plant in Rosny, France, where he initiated additional conferences and discussions concerning a possible future commerical relationship between SAPAG and Standard. During this visit Mr. Davlin and representatives of SAPAG signed a letter updating the "previous mutual understanding between Standard Fittings and SAPAG," which letter was

concerned primarily with outstanding individual orders for fittings (R.16-18). On an individual purchase-by-purchase basis, SAPAG shipped some factory surplus fittings to the destination (not Louisiana) requested by Standard, i.e., Houston, Texas, where the merchandise was warehoused for later distribution and resale by Standard. (R.107-111; R.178-79; R.180-81.)

The anticipated exclusive contractual relationship between Standard and SAPAG did not reach fruition due to, among other reasons, Standard's failure to order a minimum quantity of unions from SAPAG in 1974, a highly uncertain market and economic conditions prevailing in the relevant product market in 1974 and 1975.

REASONS FOR GRANTING THE WRIT

I

The Fifth and Ninth Circuits disagree on the jurisdictional significance of the fact that a forum plaintiff unilaterally chooses to secure a letter of credit from a forum bank in favor of the foreign defendant.[1]

In the decision below, the Fifth Circuit held that a jurisdictional contact between SAPAG and Louisiana existed in the fact that Standard obtained from a Louisiana bank a letter of credit in favor of SAPAG. 625 F.2d at 644. In Thos. P. Gonzalez Corp. v. Consejo Nacional de Producion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980), the Ninth Circuit reached

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[1] The decision below also conflicts with two other Fifth Circuit cases where the Court held as jurisdictionally irrelevant, payment to a foreign defendant by a forum plaintiff through checks drawn on a forum bank. Charia v. Cigarette Racing Team, Inc., 583 F.2d 184 (5th Cir. 1978); Benjamin v. Western Boat Building Corp., 472 F.2d 723 (5th Cir. 1973).

a contradictory conclusion.

Gonzalez was an action on an alleged breach of a contract for the purchase and sale of corn between the seller Gonzalez, a California corporation, and the buyer, the Consejo, an autonomous institution of the Republic of Costa Rica. To facilitate the sale, the Consejo obtained a letter of credit from a Costa Rican bank in favor of Gonzalez. Subsequently, the Costa Rican bank contacted its correspondent bank in California, the Crocker National Bank, and asked that it confirm the letter of credit.

The contact between the Costa Rican bank and the Crocker National Bank was made solely at the discretion of the Costa Rican Bank. Further, the contract between Gonzalez and the Consejo did not expressly require payment through a California bank. 614 F.2d at 1253-54.

Holding that the exercise of personal jurisdiction over the Consejo would offend the due process clause, the

Court stated that "the Consejo correctly notes that only its activities in California . . . can supply the basis for jurisdiction." 614 F.2d at 1253 (emphasis added). Consequently, any forum contact resulting from the Crocker National Bank's confirmation of the credit was between the Consejo's Costa Rican bank and Crocker National Bank and was not imputed to the Consejo. 614 F.2d at 1253-54.

The conflict is apparent. Applying the reasoning of the Ninth Circuit to the instant case, the conclusion is that any forum contact resulting from Standard's unilateral decision and action securing the letter of credit from a Louisiana bank in favor of SAPAG is between the bank and Standard and is not between Louisiana and SAPAG. It is simply jurisdictionally irrelevant.

Conversely, applying the Fifth Circuit's reasoning to the facts in Gonzalez, the payment by the foreign defendant through a California bank is a

jurisdictional contact between the foreign defendant and California. This is the result because under the Fifth Circuit's reasoning, payment through a forum bank is jurisdictionally significant even though the foreign defendant had nothing to do with the selection of that method of payment.

This conflict between the Fifth and Ninth Circuits reveals a disagreement as to the nature of activity which will constitute a jurisdictionally significant contact between a foreign defendant and the forum state.[2] Left unattended, this intolerable disagreement will continue to propagate inconsistent decisions on the constitutional exercise of personal jurisdiction.

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[2] The two Circuits also disagree as to the jurisdictional significance of the nonresident's forum activity which is unrelated to the litigation. Compare SAPAG, 625 F.2d at 631-32, 643 (unrelated activity significant) with Gonzales, 614 F.2d at 1249, 1254 (unrelated activity insignificant).

II

The Fifth Circuit's decision is in conflict with this Court's holding that unilateral forum-related activity on the part of one who seeks to subject a nonresident to the personal jurisdiction of the forum court is jurisdictionally insignificant.

STANDARD'S ACTIVITY IN LOUISIANA

The decision below does not recognize or articulate the following due process limitation on the exercise of personal jurisdiction:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum

> state, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958); See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980); Kulko v. California Superior Court, 436 U.S. 84, 93-94 (1978).

The letter of credit

The Court below held that a jurisdictional contact between SAPAG and Louisiana existed in the fact that Standard arranged for a bank letter of credit in favor of SAPAG through a Louisiana bank. 625 F.2d at 644.

The alleged agreement between SAPAG and Standard certainly did not require Standard to arrange for payment through any particular bank. Standard unilaterally chose to secure the letter of credit through a Louisiana bank.[3]

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[3] To the extent that Standard's selection of a Louisiana bank was or may have been foreseeable, that foreseeability is not relevant to a due process analysis of the contacts between SAPAG and the State of Louisiana. World-Wide, 444 U.S. at 295-97.

Consequently, under Hanson, Kulko and World-Wide, this fact should play no part in the resolution of the issue of whether the exercise of personal jurisdiction over SAPAG complies with due process requirements.

For example, in Hanson, the settlor of a trust unilaterally decided to move to Florida. This forced the Delaware trustee to correspond with the settlor in Florida regarding matters incident to the administration of the trust. This Court held that the trustee's correspondence, caused by the settlor's unilateral decision to move to Florida, was not a jurisdictionally significant contact between the trustee and Florida. 357 U.S. at 252. Any other decision would have meant that the trustee was subject to the personal jurisdiction of a court in any state in which the settlor chose to reside.

For another example, in Kulko, a wife separated from her husband and left New York to move to California. When the

wife brought an action in California seeking custody of their two children and an increase in child support payments, the jurisdictional question was whether the New York husband had sufficient contact with California. The California residence of the wife and two children were caused by their unilateral actions. Consequently, the fact that the husband permitted his children to live in California was not a jurisdictionally significant contact between the husband and California. 436 U.S. at 94.

In World-Wide, an individual bought a car in New York and while moving to Arizona, was involved in an automobile accident. This Court held that the car's presence in Oklahoma was the result of the owner's unilateral activity and consequently was not a jurisdictionally significant contact between Oklahoma and the New York retailer and wholesale distributor. 444 U.S. at 298.

The simple fact is that SAPAG did not secure the letter of credit from the Louisiana bank. Therefore, the decision below, allowing the exercise of personal jurisdiction over SAPAG on the basis of Standard's forum-related activity, is in conflict with World-Wide, Kulko and Hanson.

This Court's often-repeated admonition that the unilateral activity in the forum state by a forum plaintiff is jurisdictionally irrelevant to a due process analysis of the contacts between the forum state and a foreign defendant was not followed by the Court below and, consequently, a Writ of Certiorari should issue in order to reinstate the District Court's decision of dismissal.

SAPAG'S visit to another Louisiana company

The fact that Standard learned that SAPAG desired an American outlet for its products as a result of SAPAG's visit to another Louisiana company was considered

jurisdictionally significant below. 625 F.2d at 643.

Standard's discovery of SAPAG'S products constitutes unilateral forum activity on the part of Standard. To the extent that the decision below held that this is a jurisdictional contact between SAPAG and the State of Louisiana, that holding is in conflict with decisions of this Court for the same reasons discussed above relative to the letter of credit. World-Wide; Kulko; Hanson.

III

The Fifth Circuit's decision is in conflict with this Court's holding that a forum state must have a particularized interest in a controversy before that interest supports the exercise of the Court's personal jurisdiction.

The decision below improperly attaches jurisdictional significance to Louisiana's interest in this controversy. Without analysis, the Court below relies

upon McGee v. International Life Insurance Co., 355 U.S. 220 (1957), for support of its decision allowing the exercise of personal jurisdiction over SAPAG. 625 F.2d at 641. In so doing, the Court of Appeals confused the role of a state's interest in the context of a choice of law analysis with the role of that interest in a due process analysis of the contacts between the forum state and a foreign defendant.

In McGee, this Court considered as jurisdictionally important California's interest in an action by a resident insured against a foreign insurer. This interest was grounded in the fact that since such claims typically involved small amounts, if the California plaintiff did not have a California forum then he had no forum at all.[4] 355 U.S. at 223. Additionally,

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[4] Even the Fifth Circuit notes that the instant controversy, which potentially involves millions of dollars, will not be without a forum if it is not pursued in Louisiana. 625 F.2d at 644 n. 25.

this Court was impressed by California's interest in the controversy as manifested by the fact that the State Legislature had passed a special jurisdictional statute concerning such claims. 355 U.S. at 221, 224.

Kulko refined the contours of the jurisdictional importance of a state's interest in a controversy. Kulko was a child-custody and child-support action brought in California involving children residing with their mother in California. California's interest in the controversy may have been relevant to a choice of law decision, but the interest was not jurisdictionally significant because California had not asserted any "particularized interest" in trying such cases in its courts. 436 U.S. at 98 (noting the importance in McGee of the fact that California had enacted a special jurisdictional statute relative to the claims of resident insureds against foreign insurers).

After Kulko it is clear that a state must have a "particularized interest" in the controversy before that interest is jurisdictionally significant; an interest which may be strong enough to call for the application of the law of the forum state is not enough.[5]

Louisiana simply has no particularized interest in the instant controversy. In point of fact, Louisiana's interest in this contract action is far less compelling than was California's interest in the child support/custody action concerning resident minors in Kulko.

Because the decision below relies on Louisiana's interest in the instant controversy, it is in conflict with this Court's holding that a forum state's

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[5] There would seem to be no dispute on choice of law in this case. Regardless of the forum, the law of France will apply as that is where the alleged contract was made and it was in France that all aspects of SAPAG's performance occurred.

interest is jurisdictionally significant only where there is evidence of a "particularized interest" in the controversy. Kulko; McGee.

CONCLUSION

For the reasons stated above, the Petitioner submits that a Writ of Certiorari should issue.

Respectfully submitted,

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PETITIONER, SAPAG, S.A.

STANDARD FITTINGS COMPANY,
Plaintiff-Appellant,

v.

SAPAG, S.A., Defendant-Appellee.

No. 77-3486.

United States Court of Appeals,
Fifth Circuit.

Sept. 11, 1980.

Louisiana corporation brought action in state court against French manufacturer to recover for alleged breach of exclusive distributorship contract. The case was removed to federal district court. The United States District Court for the Western District of Louisiana, 448 F.Supp. 426, Nauman S. Scott, J., dismissed the suit for lack of in personam jurisdiction, and appeal was taken. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that activities of French manufacturer, having as their purpose the establishment of Louisiana based company as exclusive North American distributor for its products, were sufficient to bring it within boundaries of Louisiana long-arm statute and principles of due process, and thus subjected it to jurisdiction of Louisiana courts.

Reversed and remanded.

1. Courts ⇐12(2)

Louisiana long-arm statute permits full due process exercise of personal jurisdiction over nonresident defendants. LSA-R.S. 13:3201; U.S.C.A.Const. Amend. 14.

2. Courts ⇐12(2)

"Transacting business" within meaning of Louisiana long-arm statute does not require finalization of the negotiation process. LSA-R.S. 13:3201(a).

3. Federal Courts ⇐84

Activities of French manufacturer, having as their purpose the establishment of Louisiana-based company as exclusive North American distributor for its products, were sufficient to bring it within bounda-

ries of Louisiana long-arm statute and principles of due process, and thus subjected it to jurisdiction of Louisiana courts on claim of breach of distributorship contract. LSA–R.S. 13:3201(a); U.S.C.A.Const. Amend. 14.

Leslie J. Schiff, Opelousas, La., for plaintiff-appellant.

Phelps, Dunbar, Marks, Claverie & Sims, Rutledge C. Clement, Jr., New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEE, TJOFLAT and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Appellant Standard Fittings, a Delaware corporation, is engaged in the business of manufacture, purchase, sale and distribution of high-pressure fittings, valves, unions and other items. Its business is centered in Opelousas, Louisiana. Appellee Sapag, S.A. is a French manufacturer of high-pressure fittings. It has not qualified or been licensed to do business in Louisiana. Appellant brought suit in a Louisiana state court against appellee for alleged breach of an exclusive distributorship contract between the parties. The case was removed to federal district court pursuant to 28 U.S.C. § 1441 (1976). Subject matter jurisdiction is predicated on diversity of citizenship.

We are asked in this appeal to review the district court's dismissal of the case for lack of in personam jurisdiction over appellee Sapag. The district court held that Sapag was not amenable, under the Louisiana Long-Arm Statute and principles of constitutional due process, to the personal jurisdiction of a Louisiana court. *Standard Fittings Co. v. Sapag, S.A.*, 448 F.Supp. 426 (W.D.La.1977). Because we conclude that both Louisiana law and the due process clause of the fourteenth amendment to the Constitution permit the exercise of in personam jurisdiction over Sapag, we reverse and remand to the district court for trial.

FACTS

Our inquiry into the applicability of the Louisiana Long-Arm Statute and the due process implications of the exercise of in personam jurisdiction over Sapag is a fact-sensitive one. The facts relevant to Sapag's motion to dismiss for lack of in personam jurisdiction derive from the pleadings, memoranda, affidavits, attachments and correspondence on file in the record.

It appears from the record that Sapag's first contact with the forum state, Louisiana, came with the visit [1] in the fall of 1973 of L. L. Frederick,[2] marketing consultant

1. The district court made no mention of this contact of Sapag representatives with Louisiana, probably because of its legal conclusion with respect to the meaning of "transacting business", a conclusion which we discuss and disavow, *infra*, in section 1 b. of this opinion.

2. The nature of the relationship between Mr. Frederick and Sapag is characterized quite differently by the parties. Sapag contends that Frederick had no authority to contract on its behalf. Standard Fittings claims that Frederick had both actual and apparent authority to bind Sapag. The affidavit of Leonard L. Frederick, R. 55–56, reveals that, during the time relevant to this case, Frederick was under contract with Sapag to promote Sapag's products. Frederick was obligated to spend approximately fifty days per year of his time on Sapag's behalf. Frederick swears, "[d]uring the approximately five years the contract was in effect, I served Sapag by introducing the company and its product to various engineering contracting companies in the United States and by conveying information to such companies about the Sapag products, but I have never made a contract on their behalf and have never received any legal process on their behalf except for the Citation and Petition in this case." Correspondence in the record between Frederick, based in Whippany, New Jersey, and Standard Fittings in Opelousas shows that Mr. Frederick did indeed act on behalf of Sapag in the business dealings between Sapag and Standard Fittings. See Record 29, 70, 71, 72. Mr. Frederick wrote his letters to Standard Fittings on stationery with the heading "SAPAG" in bold letters at the top center and

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for Sapag, and Georges LeLievre, sales manager of Sapag (R. 180) to the office of Dixie Supply Mill Company in New Orleans, Louisiana. While the visit itself is undisputed, its nature and purpose are described differently by the parties. LeLievre, in an affidavit filed in support of Sapag's motion to dismiss, swears that this visit was "a brief stop . . . to investigate any possibility of cooperation as a follow-up of a price inquiry for valves that Dixie Mill sent to Sapag; no agreement was reached. Following this abbreviated conference, affiant and consultant left the State of Louisiana the same day without further conferences with or visits to other fittings dealers in that state." (R. 180). Mike Cahn, president of Dixie Mill Supply Co., Inc., swears, in pertinent part, in his affidavit filed on behalf of Standard Fittings:

> 2. That sometime during 1973, Mr. L. L. Frederick and Mr. G. LeLievre called upon Dixie Mill Supply Co., Inc. in New Orleans at its offices in New Orleans, Louisiana, for the purpose of soliciting business. That Frederick and LeLievre on behalf of Sapag asked affiant to take on the Sapag line as a distributor for the company in the Southern part of the United States.
>
> 3. That affiant after the visit by Sapag representatives in his plant in New Orleans, Louisiana, informed Standard Fittings Company's president, Irwin H. Davlin, of the fact that Sapag was interested in a United States outlet for its products.

(R. 160). The affidavit of Jules Cahn, Vice-President of Dixie Mill Supply Co., Inc., is to the same effect (R. 151). The district court failed to acknowledge this Fall, 1973, contact between Sapag and the State of Louisiana. We find that omission significant because the Cahn affidavits swear that LeLievre and Frederick came to Louisiana soliciting business on behalf of Sapag. LeLievre's affidavit, while indicating that the visit was a follow-up to a price inquiry, does not deny that Sapag had asked the Cahns to take on the Sapag line as a distributor for the Southern part of the United States. A letter written by Frederick to Jules Cahn and filed subsequent to the filing of the Cahn affidavits referred to above supports the contention that Sapag was interested in importing its product to the United States, and specifically to New Orleans.[3] The Cahn affidavits are also uncontradicted in their suggestion that Standard Fittings learned about Sapag through the Cahns as a result of the 1973 visit by Sapag's Frederick and LeLievre. The affidavit of Irwin Davlin, President of Standard Fittings, supports this view. Davlin swears that "it was as a result of this trip into

at the top right. While Mr. Frederick may not have had authority to contract on behalf of Sapag, an issue we need not reach, it is clear, from the letters and telex messages exchanged between Frederick and representatives of Standard Fittings, that Frederick's role was to facilitate the ordering, shipment and delivery of products manufactured by Sapag for Standard Fittings under the agreement which is the subject of this suit.

3. The letter dated May 2, 1973, reads as follows:

> Mr. Jules Cahn
> Dixie Mill Supply Co.
> P. O. Box 52005
> New Orleans, Louisiana 70150
>
> Dear Mr. Cahn:
>
> As suggest [sic] by mr [sic] Mike E. Cahn in a recent telephone conversation, we are enclosing our catalogs SB71R on Forged Steel Fittings, SR72R and Forged Steel Valves and SC72RJ on Safety Relief Valves.
>
> All valves and fittings are made strictly to American specifications.
>
> We make two lines of valves, the hancock under license from Dresser which we cannot import to the U.S.A and the Chervet line (our own) *which we would like to import to the U.S.A.* The quality of these two valves are [sic] on a par and a picture of the Chervet valve is shown inside the back cover of SR72R. If you would like to check out the prices on a representative container or half-container lot, that is 37,000 or 20,000 lbs. give us the sizes you would like and the trim and we will give you a CIF price and weight study for shipment to *New Orleans.*
>
> Please let us hear from you as we believe we can give you a very satisfactory price arrangement.
>
> Very truly yours,
> L. L. Frederick
>
> Encl. Cats.

(emphasis added); (R. 165).

Louisiana [the Fall, 1973, visit of LeLievre and Frederick] that Standard Fittings Company learned of the willingness of Sapag to sell its French made products in Louisiana . . . ." (R. 138).

The relationship between Sapag and Standard Fittings began when Shelton Courville of Standard Fittings in Opelousas and L. L. Frederick on behalf of Sapag in New Jersey spoke over the telephone about Sapag's products. As a result of the conversation, Frederick arranged to have a catalog and additional information, including samples, sent to Standard Fittings. (See letter from Frederick to Courville of January 22, 1974, at R. 140).

In February, 1974, Irwin Davlin, president of Standard Fittings, went to France where he met and negotiated with L. R. Guillemin and R. Patteeuw of Sapag. These three signed an agreement dated February 19, 1974, which is the subject of this suit.[4] The agreement[5] contemplated a substantial volume of business.[6] It provided that Standard would order 27,500 unions for each month of 1974, beginning in May, and that if Standard purchased a certain average number of unions from Sapag in 1974, Sapag would give Standard an annually renewable exclusive distributorship for unions (in excess of 350,000 annually) and fittings (approximately 420,000) beginning in 1975. Sapag agreed to accept no further orders for unions or fittings from the USA or Canada for the balance of 1974 except for previous commitments. The agreement also contemplated the grant to Standard Fittings of an exclusive representation of Sapag valves in North America. The agreement provided for shipment by Sapag of its products CIF New York City or Houston, and it provided that "Standard may sell and Sapag on request will ship for Standard to any port of the world except Europe." It required that Standard Fittings obtain a bank letter of credit in favor of Sapag.[7] Finally, the agreement recited that its general purpose was "to develope [sic] a relationship whereby Standard or its assignee shall be exclusive North American distributor for Sapag."[8]

Following the agreement in Paris, Frederick corresponded with Standard Fittings Co. by letter (R. 141; 72) and telex (R. 142; 73). Frederick arranged to visit Standard Fittings' plant and to meet with Mr. Davlin on the morning of May 10.[9] The scheduled meeting was apparently delayed, but Mr.

4. Record 12-15

5. The question whether this agreement was binding, while critical to the merits of this case, is not crucial to the determination of the issue before us. What is important for our purposes is what actions occurred in furtherance of the agreement, what the agreement of the parties contemplated and what performance actually occurred. *See Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973), where we noted that in order to show that the forum's jurisdictional statute is satisfied, plaintiff need only show a prima facie cause of action.

6. The precise dollar amounts involved are not relevant to our inquiry. However, the order forms included in the record indicate monthly amounts ranging from approximately $48,000 to $63,000.

7. This was done through the First National Bank of Commerce in New Orleans and under the terms of the guarantee, payment was made in New Orleans, Louisiana, by Standard Fittings Company to Sapag for all shipments of goods. Affidavit of Davlin, item 11, R. 138.

8. Record 15.

9. Frederick's telex message reads in pertinent part as follows:

3 MAY 1974, ATTN. MR. DAVLIN, REFERENCE TO YOUR INQUIRY FOR VALVE SOME TWO WEEKS AGO AND OUR CONVERSATION TODAY. THE FOLLOWING IS OUR BASE PV . . . (SCHEDULE OMITTED).
THE ABOVE EXPRESSED IN U.S. DOLLARS FOR FRENCH PORT. INVOICES WILL REFLECT THE QUARTERLY ADJUSTMENT OF PRICE AT THE TIME OF SHIPMENT.
LONTG [sic] TERM DELIVERIES UNDER A PROJECTED SCHEDULE CAN START ON A MONTHLY BASIS STARTING 1 ST JANUARY 1975.
WE CAN GIVE YOU THE FOLLOWING ITEMS DURING THE MONTH OF OCTOBER WHICH AMOUNT TO ABOUT A HALF OF A CONTAINER (10 TONS) . . . (SCHEDULE OMITTED).
NO SHIPMENT OF 1½ AND 2" . . . (SCHEDULE OMITTED). WILL BE PACKED IN LIGHT BOXES IN THE CONTAINER. ADD TWO PERCENT TO TOTAL PRICE FOR CIF SHIPMENT TO HOUSTON.

Frederick did in fact visit the Standard Fittings plant in Opelousas in June, 1974, "[p]ursuant to his promotional endeavors relative to the North American market . . . ." (Affidavit of Jacques Oyer, president of Sapag, S.A., R. 110).[10]

In September, 1974, Davlin again went to France and certain portions of the agreement between Standard Fittings and Sapag were amended.[11]

In February, 1975, Sapag's LeLievre and Patteeuw visited the Standard Fittings plant in Opelousas. LeLievre and Patteeuw arrived in Opelousas on the evening of February 6, 1975, and had dinner at Mr. Davlin's home. (Oyer affidavit, R. 110). The next day, February 7, they met with Davlin at the Standard Fittings plant. They left Louisiana later that day. Letters[12] written by LeLievre to Davlin subsequent to the visit of Patteeuw and LeLievre

I SHALL PLAN TO VISIT YOUR PLACE ARRIVING IN THE EVENING OF MAY 9 AND SPEND THE MORNING OF 10 MAY WITH YOU AT THE OFFICE.
WE CAN FURTHER OUR DISCUSSION OF THIS PROPOSAL THEN.
BEST REGARDS. L. L. FREDERICK, SAPAG, U.S.A. WIPY

10. The district court found that it was "unclear what business, if any, was conducted on this visit." *Standard Fittings Co. v. Sapag, S.A.*, 448 F.Supp. 426, 427–8 (W.D.La.1977). The telex message quoted in footnote 9, above, shows that Frederick contemplated further discussion of the business proposal discussed by Frederick and Davlin, a proposal apparently involving long-term delivery of valves to Standard Fittings, CIF shipment to Houston.

11. Davlin affidavit, R. 137; R. 16–18.

12. These letters written by Mr. LeLievre to Mr. Davlin read as follows:

Mr. I. DAVLIN
President
STANDARD FITTINGS COMPANY
P.O. Box 1268
OPELOUSAS - LOUISIANA 70570
UNITED STATES

GL/HD
03/5334

Rosny, February 25th 1975

Dear Mr. Davlin,

Some time has already passed since Mr. Patteeuw and I had the pleasure of visiting with you in Opelousas.

Please accept my apologies for thanking you with such a delay for the kind welcome you extended to us in your house and in your plant.

Since we returned, we have been studying very carefully the various possibilities we have to supply you with material in accordance with the last conversation we had in your office and we expect to inform you of our position early next month.

We are also looking to the question also discussed in Opelousas of possibly purchasing 304 or 316L Stainless Steel Screwed Fittings from you if prices are attractive, and shall appreciate receiving up to date information or price list from you at your earliest convenience.

Hoping to find a satisfactory solution to our present problems, I remain,

Very Truly Yours

G. LELIEVRE

Note 12—Continued

DIRECTION COMMERCIALE
BP. 9 D'ALSACE-LORRAINE
69310 ROSNY-SOUS-BOIS
TEL. 528 05-50 + 44 05-54 +
TELEX 22.388 SAPAG - ROSNY

MAR 1 4 1975

Mr L. DAVLIN
President
STANDARD FITTINGS COMPANY
P. O Box 1268
OPELOUSAS
Louisiana U. S. A.

Réf. GL/AM 03/5336

Vos réf.

Rosny, March 10th 1975

Dear Mr Davlin,

Following our latest discussion in Opelousas and as indicated in our letter dated 25th February, we have investigated what could be, presently, for SFC our very best possibilities of supply of unions and valves, both fields for which a cooperation was initiated in 1974.

Starting from that investigation, we have drafted a schedule of deliveries which is herewith attached and which we comment hereafter :

As far as forged steel valves are concerned, the one order for valves which you sent us in July 1974 has been partially delivered in October 1974 for one third of the quantities. The remaining two thirds could be made available by July and November 1975. The present trend of the international market being more and more for welded bonnet instead of bolted bonnet valves has led us to redirect our production to this type of equipment and consequently it is the welded bonnet model of valve which we could then supply to you.

In last July, we had quoted you prices in US$ when at that time the rate of exchange was 1 US $ = 4, 90 FF. When expressed in FF our prices are unchanged but, you will understand that the US$ fluctuations and its present rate unfortunately do not allow us any longer for a payment in that currency as in the past. Hence the reason of our quotation in franch francs mentioned during our visit to Opelousas.

Furthermore, as was previously discussed, we have had, much to our regret, to up-date the prices in connection with the still increasing cost of the raw materials and the attached schedule based on our tariff in effect in January 75 takes this into account. However, to lessen the consequences, please note that, quite exceptionnally, the indicated prices will remain firm during the whole duration of the delivery period of the equipments shown in the schedule.

As for the unions we have shown separately the container which was scheduled for 1974 delivery in the corresponding order acknowledgement and the three other containers, i. e. four altogether, which we could ship to you up to the end of 1975. You will see that a container could thus be delivered every quarter.

to Opelousas make it quite clear that the agreement between Standard Fittings and Sapag had been the subject of discussion and negotiation during the visit.

Finally, it appears that Sapag actually delivered some quantity of its product (valves) to Standard Fittings.[13]

THE LEGAL STANDARDS

In determining whether Sapag is subject to in personam jurisdiction of the Louisiana courts and hence the federal court to which the action against it was removed, we follow a two-step analysis. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). We must determine, first, whether Sapag is amenable to service under the Louisiana Long-Arm Statute. Louisiana law controls this question. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d at 1232; *Barrett v. Browning Arms Co.*, 433 F.2d 141 (5th Cir. 1970). If the requirements of the Louisiana Long-Arm Statute are satisfied, we must next apply federal law "to determine whether assertion of jurisdiction over the defendant comports with

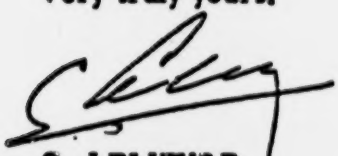
Note 12—Continued

Concerning the prices, no modification would be brought up on the basis of our tariff in french francs for the first container, but the following one scheduled for delivery during the second quarter would bear the price increase we have been met with at the end of 1974 (see our nett price list 216 AU herewith attached) and in the same way, the prices of the third and fourth quarters deliveries should be discussed and agreed upon respectively on the 1st of July and on the 1st of October prior to actual shipment. For reasons indicated above, settlement should be made in french francs.

The letter of credit which you had kindly opened with the First National Bank of Commerce expires in a few days, its extension should be considered if, as we do hope, a cooperation on the above basis can be contemplated.

As we are "freezing" the offered equipments until the end of March, I am sure you will understand that any answer from you before that time would be more than appreciated and, looking forward to hearing from you and your acceptance of this proposed scheme, I remain, Dear Mr Davlin,

Very truly yours,



G. LELIEVRE
General Sales Manager

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13. See March 10, 1975, letter from LeLievre to Davlin. The district court assumed that the delivery of any of Sapag's product to Standard Fittings occurred in Houston or New York, thereby terminating Sapag's performance. The district court thus found that the presence in Louisiana of any Sapag product was due to the action of Standard Fittings. We see no reason to disturb these findings. We note, however, that "jurisdiction does not depend on the technicalities of when title passes." *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir.

due process." *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d at 1232 (5th Cir. 1973).

1. Long Arm Statute

We inquire first whether Sapag is subject to in personam jurisdiction under the Louisiana Long-Arm Statute. That statute, La. Rev.Stat.Ann. § 13:3201 (West), provides in pertinent part: [14]

> Personal jurisdiction over nonresidents
>
> A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's
>
> (a) transacting any business in this state

The question we must address is: what is "transacting any business" in Louisiana under Louisiana law? The district court judge found that under the principles of *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), correspondence between Louisiana and France and the remittance for goods made through Louisiana banks could not be characterized as the transaction of business. He found that the inability of Sapag's agent L. L. Frederick to contract on Sapag's behalf "prohibits the conclusion that Frederick's visit to Louisiana resulted in the transaction of business." Finally, he found that a business transaction under the statute "contemplates the finalization of a negotiation process." *Standard Fittings Co. v. Sapag, S.A.*, 448 F.Supp. 426, 429 (W.D.La.1977).

[1] We think that the district court judge erred in his application of the law. Specifically, we think that the district court judge has read too narrowly the jurisprudence of Louisiana with respect to the reach and the requirements of the Long-Arm Statute.[15] We find that the Louisiana

1980), *citing Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 595–6 (5th Cir. 1969).

14. The Louisiana Long-Arm Statute, as amended in 1977, reads in full as follows:

> § 3201. Personal jurisdiction over nonresidents
>
> A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's
>
> (a) transacting any business in this state;
>
> (b) contracting to supply services or things in this state;
>
> (c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;
>
> (d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; or
>
> (e) having an interest in, using, or possessing a real right or immovable property in this state.
>
> (f) non-support of a child or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state.

While it is not clear that Standard Fittings is attempting to assert jurisdiction only under the provisions of section (a) of the Long-Arm Statute, we limit our inquiry to the applicability of that section as did the court below. Because we find the requirements of section (a) were met, we need not address whether section (b) of the Long-Arm Statute might apply in this case as well.

15. The district court concluded that the only relevant business activity would be finalization of the contract in Louisiana for purposes of the Long-Arm Statute. This erroneous legal conclusion led to the further erroneous conclusion that Frederick's contacts in Louisiana on behalf of Sapag were irrelevant because he was an agent without authority to conclude contracts. The district court's determination that Sapag's other contacts with the forum state were irrelevant as well also appears to flow from this erroneous view of the requirements of the Long-Arm Statute.

We note further that in deciding that the requirements of the Louisiana Long-Arm Statute were not met, the district court relied heavily on *Benjamin v. Western Boat Building Corp.*, *supra*. To the extent that the district court relied on *Benjamin* to elucidate the meaning of "transacting business" under the Louisiana Long-Arm Statute, that reliance was misplaced. The *Benjamin* case was decided exclusively on the basis of a due process analysis: the court declined to reach the question of whether the contacts with the forum there amounted to "transacting . . . business" under the Louisiana Long-Arm Statute. 472 F.2d at 725. The court, instead, measured the contacts between the defendants and the forum against the requirements of due process and found the contacts insufficient. Thus while we must consider *Benjamin* in resolving the issue

Long-Arm Statute was intended to reach to the limits of due process and that "transacting business" does not require finalization of the negotiation process or authority to contract on the part of agents who engage in business activity within the forum state on behalf of defendant.

a. The Reach of the Long-Arm Statute

The comments of the Louisiana State Law Institute, published in connection with the 1964 Long-Arm Statute, indicate the statute's intended reach. Comment (a) reads:

> Comments of Louisiana State Law Institute—1964
>
> (a) R.S. 13:3201 through 13:3207 were adopted on the recommendation of the Louisiana State Law Institute to permit the courts of this state to tap the full potential of jurisdiction in personam over nonresidents permitted by *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945); and *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

Comment (d) reads:

> (d) "Transacting business", as used in Subdivision (a), is a term which is much broader than "doing business" as defined by earlier Louisiana cases, and the phrase "does * * * business" of Subdivision (d) conferring personal jurisdiction over a nonresident on a cause of action arising ex delicto or quasi ex delicto. *It is intended to mean a single transaction of either interstate or intrastate business, and to be as broad as the phrase "engaged in a business activity" of R.S. 13:3471(1).*

(emphasis added).

The Louisiana Court of Appeal has held that § 13:3201 was intended to permit the exercise of in personam jurisdiction to the full limits of due process. *Aucoin v. Hanson*, 207 So.2d 834 (La.App.1968); *Mayeux v. Hughes*, 333 So.2d 273 (La.App.1976). We note that this court said in *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), that "it is unclear whether the Louisiana statute was intended to go to the permissible limits of due process in the exercise of in personam jurisdiction in *contract* cases . . . ." (emphasis added) 472 F.2d at 725. This idea was repeated in *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 185 n.2 (5th Cir. 1978). The *Benjamin* court referred to a suggestion by a Louisiana commentator[16] that Louisiana courts restrict the Long-Arm Statute to a narrower scope in contract cases as compared to tort cases. We reject that suggestion. The Louisiana courts have repeatedly stated without qualification that § 13:3201 was intended to extend to the limits of due process. *Aucoin v. Hanson*, 207 So.2d 834 (La.App.1968); *Mayeux v. Hughes*, 333 So.2d 273 (La.App.1976).[17]

before us, its value lies not in its interpretation of the meaning and requirements of the Louisiana Long-Arm Statute but rather in the light it casts on the requirements of due process.

16. *See* Lewis, *Suing a Nonresident—the Reach of Louisiana's Long-Arm Statute*, 19 La.B.J. 205 (1971).

17. The *Benjamin* panel mentioned several cases as possible support for a more limited jurisdictional reach in contract cases, but expressly declined to consider the question. We find that the cited cases do not support the distinction, and in any event the cases are all distinguishable from the instant case. In *Bowlero v. Allen*, 205 So.2d 196 (La.App.1967), the plaintiff (Louisiana corporation) sued defendant (Texas resident) in Louisiana for a declaratory judgment seeking to determine the plaintiff's legal responsibility to its co-plaintiffs on certificates of indebtedness acquired by defendant through a series of endorsements. The defendant's only contact with Louisiana, the forum state, was that he sent demand letters to co-plaintiffs in Louisiana. The Louisiana court refused to exercise in personam jurisdiction because it found that the making of a demand for payment does not amount to transacting business and because the cause of action did not arise out of the mailing or receipt of demand letters.

In *Moore v. Evans*, 196 So.2d 839 (La.App.), *writ refused*, 250 La. 894, 199 So.2d 914 (1967), plaintiff (Texas resident) sued defendant (Louisiana resident) in Louisiana to have a judgment rendered in Texas (for plaintiff and against defendant) recognized. The suit in Texas had been on a note signed by defendant in Louisiana but payable in Texas. Refusing to find

More importantly, both the Louisiana Supreme Court and the Louisiana Court of Appeal, in cases decided after *Benjamin* and after the 1971 article by the Louisiana commentator, have similarly described the full reach of the statute in a contract setting. *Adcock v. Surety Research and Investment Corp.*, 344 So.2d 969, 971 (La. 1977); *Latham v. Ryan*, 373 So.2d 242 (La. App.1979).[18] We are, therefore, confident

personal jurisdiction under the Texas statute proper, the Louisiana court said, "[t]here is no showing that defendant did anything in connection with the note sued on except signing it as a co-maker in Louisiana." There was evidence that defendant had made several trips to Texas on behalf of another company of which he was the director, but there was no showing whether that company and the company obligated under the note were the same. The court, deciding the case on the basis of due process, said, "plaintiff has not shown that defendant conducted any business in Texas so as to bring him within the [*International Shoe*] doctrine." 196 So.2d at 840.

In *Fidelity Credit Co. v. Bradford*, 177 So.2d 635 (La.App.1965), B (Louisiana resident) was the maker of a promissory note payable to V-M of Louisiana, and purchased by F. F sued B in Louisiana, and B sued V, an Oklahoma corporation. V was a wholesaler which sold central vacuum cleaner units to retailers in Louisiana but had no control over the subsequent sale of the units and otherwise had no contact with Louisiana. Although the Louisiana court refused to find personal jurisdiction, it drew no distinction between contract and tort cases for purposes of the exercise of in personam jurisdiction. Moreover, it expressly noted that the Louisiana Long-Arm Statute, was intended to be as broad as, though not broader than, due process would allow.

See also Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co., 259 La. 635, 251 So.2d 45 (1971) which is discussed in footnote 18.

18. We observe, however, that there is a distinction drawn in Louisiana jurisprudence between the contacts sufficient for the exercise of in personam jurisdiction in a contract case involving a nonresident buyer as compared to a contract case involving a nonresident seller. *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*, 259 La. 635, 251 So.2d 45 (1971); *Kalvar Corp. v. General Micrographics*, 318 So.2d 71 (La.App.), *writ refused*, 322 So.2d 773 (La.1975). That distinction, however, is a matter of due process, not the definition of "transacting any business." *Kalvar* at 73. The Louisiana Supreme Court in *Riverland* explains the differences between foreign purchasers and foreign sellers with respect to the due process clause: (1) interstate sellers should be aware that most states require them to go to the residence of the purchaser to sue on a claim arising from the transaction; (2) interstate sellers can usually travel more easily to foreign jurisdictions; (3) sellers accept the possibility that they will have to travel to foreign jurisdictions to enforce their rights as a risk of interstate business; (4) there is no reason for mail order purchasers to expect that they might be sued in a distant forum for failure to pay for an isolated purchase in a foreign state; (5) sellers usually are engaged in business for profit; (6) many buyers of goods from a foreign jurisdiction are consumers satisfying personal needs or pleasure and not pursuers of profit; (7) buying is not traditionally the same as doing business; (8) buyers do not normally contemplate the use of the courts of the seller's state. *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*, 259 La. 635, 251 So.2d 45, 47 (1971). Thus, the court concludes, "[s]uch differences between interstate purchasers and interstate sellers support the conclusion that it would 'offend traditional notions of fair play and substantial justice' to allow a foreign state to subject an out of state purchaser to its jurisdiction." 251 So.2d at 47.

We express no opinion with respect to the soundness of this distinction between nonresident sellers and nonresident buyers in Louisiana jurisprudence. We suggest, however, that the distinction between buyers and sellers should be only one factor in the due process analysis, a factor which may have a bearing on the quality of the defendant's contact with the forum. This is so because a nonresident seller who sells his product within the forum state may, depending on the facts of the case, more purposefully avail himself of the benefits of the forum state than does a nonresident buyer who buys a product from within the forum state. The former may have significant, frequent and purposeful contacts with the forum in furtherance of its sales business, while the latter's contact may be but an isolated consumer purchase. Nevertheless, we suggest that the status of buyer or seller alone should not be determinative of the due process inquiry. It should be only one element which helps to describe the quality of the defendant's contact with the forum.

Finally, we point out that to the extent that the district court judge in the instant case relied on *Kalvar Corp. v. General Micrographics*, 318 So.2d 71 (La.App.), *writ refused*, 322 So.2d 773 (La.1975), to determine whether the requirements of the Louisiana Long-Arm Statute have been met in this case, his reliance was improper. *See Standard Fittings v. Sapag, S.A.*, 448 F.Supp. 426, 429 n.4 (W.D.La.1977). *Kalvar* was decided not on statutory grounds but on constitutional grounds. The Louisiana Court of Appeal in *Kalvar* stated with some reluctance that the case was controlled by the

that the Louisiana Long-Arm Statute permits the full due process exercise of personal jurisdiction over nonresident defendants.[19]

Having decided that the statutory inquiry is synonymous with the due process inquiry, we would ordinarily turn directly to the due process issue. We look first, however, to the Louisiana Court of Appeal's interpretation of the requirements of "transacting business" in order to assess the district court's conclusion that finalization of the contract in Louisiana is necessary under the Long-Arm Statute.

b. The Requirements of the Long-Arm Statute

[2] We next consider the meaning of "transacting business" under the Louisiana statute. Specifically, we inquire whether "transacting business" requires, as the district court found, "finalization of the negotiation process." We hold that under Louisiana law it does not. In *Aucoin v. Hanson*, 207 So.2d 834, 836 (La.App.1968), the Louisiana Court of Appeal, construing § 13:3201(a) in the context of a suit on a contract, held that "[t]he design of the Louisiana Long-Arm Statute was to reap the fullest benefit from United States Supreme Court cases in which the due process requirements under the federal constitution have been relaxed, as such pertain to personal jurisdiction in civil suits." The court held that the defendant had "transacted business" within the meaning of § 13:3201(a) even though defendant's sole contact with the State of Louisiana was through an agent who apparently had no authority to contract on behalf of his principal. The agent carried out preliminary negotiations with the plaintiff in Louisiana. The contract was finally made between plaintiff and defendant in a telephone conversation. Its terms differed from those discussed by the plaintiff and defendant's agent. The court noted that it was as much a Mississippi contract as a Louisiana contract. Yet, despite the fact that defendant's agent had no authority to contract on behalf of defendant and the fact that "finalization of the negotiation process" occurred during an interstate telephone call between plaintiff and defendant, the court found that the defendant was transacting business within § 13:3201(a).[20]

We conclude that Louisiana courts have taken the position that "transacting business" under the Louisiana Long-Arm Stat-

principles set forth in *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*, 259 La. 635, 251 So.2d 45 (1971). In *Riverland*, the Louisiana Supreme Court approved a more restrictive standard of minimum contacts for nonresident purchasers, as compared to nonresident sellers. Although it mentioned other factors, the *Kalvar* court apparently found the defendant's status as a nonresident purchaser controlling in light of *Riverland* and affirmed the trial court's refusal to exercise jurisdiction. *Kalvar* is thus decisive neither of the statutory issue we face (because it was decided on constitutional grounds) nor of the constitutional issue we face (because its due process analysis apparently turned on defendant's status as a nonresident purchaser, a fact which we do not believe should be determinative, and because, in any event, we deal with a nonresident seller).

19. Our decision is not contrary to the holdings of, or even the dicta in, *Benjamin* and *Charia*. Any decision with respect to the reach of the Louisiana Long-Arm Statute in those cases would have been dicta because both cases were expressly based solely on the due process analysis. Moreover, the two cases did not even venture in dictum to say that the Louisiana Long-Arm Statute fails to exercise jurisdiction to the full due process limits, rather they said only that the issue was unclear.

20. The Florida District Court of Appeals indicated that "transaction of business" occurs within the Louisiana Long-Arm Statute in the absence of "finalization of the negotiation process" in *Fisher v. Premiere Realty Co.*, 296 So.2d 447 (Fla.Dist.Ct.App.1974). There the court held that the three appellants, non-resident shareholders in a corporation, were transacting business under § 13:3201(a) by virtue of having personally guaranteed performance of a lease between the corporation and the Louisiana plaintiff; the corporation had operated a restaurant for two years on the leased premises located in Louisiana. The court said, "[w]hen the three of them undertook to guarantee performance of the lease by the corporation, it is our view that they thereby appointed the corporation as their agent to carry out the terms of the lease in Louisiana and were personally transacting business in Louisiana." 296 So.2d at 449.

ute does not require "finalization of the negotiation process."[21] Rather, the Louisiana courts have held that the Long-Arm Statute was intended to extend to the limits of due process. Business activity which will satisfy the requirements of due process will thus necessarily satisfy the "transacting business" requirement of the Long-Arm Statute. We, therefore, turn our inquiry to the requirements of due process.

2. Due Process

The district court found that Sapag's activities in Louisiana constituted a sufficiently minimal presence in Louisiana that it would be unfair to conclude that Sapag had given up its right to be sued only at its own domicile. Thus, the court found, appellant failed to show that the requirements of due process had been satisfied.

The issue we must address was formulated in the Supreme Court case, *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). There the Court held that in order to subject a nonresident defendant to in personam jurisdiction, that defendant must have certain minimum contacts with the foreign state.[22] Said the Court, "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present with the territory of the forum, he have certain minimum contact with it such that the maintenance of the suit does not offend internal 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316, 66 S.Ct. at 158.

In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), the Supreme Court gave expression to another factor which bears on the question whether the nonresident defendant has sufficient minimum contacts with the forum state to permit the exercise of in personam jurisdiction over him. That factor is the forum state's "interest in providing effective means of redress for its residents . . .." *Id.* at 223, 78 S.Ct. at 201. The Court pointed out that the suit in *McGee* was "based on a contract which had substantial connection with that State [California]." *Id.* at 223, 78 S.Ct. at 201.

In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the Supreme Court drew back from its trend toward expanding power to exercise personal jurisdiction over nonresident defendants, refused to allow the exercise of personal jurisdiction and held:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule would vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253, 78 S.Ct. at 1239.

The Supreme Court has addressed the in personam jurisdiction problem most recently in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). In *World-Wide*, the Court said, "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . [cite omitted] it has clear notice that it is subject to suit there and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are

21. In our view, finalization of the agreement in Louisiana might have been a contact superior in quality to the actual contacts, taken singly, between Sapag and Louisiana. However, we conclude that such finalization is by no means necessary either to satisfy the requirements of the statute or to comport with due process.

22. There is no particular formula for showing that the due process requirement that a defendant have minimum contacts with the forum has been satisfied. Showing that a nonresident defendant is transacting business within the forum state is but one mode of showing that the nonresident defendant has sufficient minimum contacts to satisfy the due process clause. Thus "transacting business" is simply a term which is descriptive of the aggregate of activities which, in combination, satisfy the requirements of due process.

too great, severing its connection with the State." 444 U.S. at 567, 100 S.Ct. at 567. And the Court noted further, "the foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 567, 100 S.Ct. at 567.

Several cases in this circuit offer guidance. In *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), this court ruled: "while very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement, we have, nevertheless, unequivocally required *some* activity by the defendant before permitting the exercise of in personam jurisdiction under a state 'long-arm' statute, the jurisdictional touchstone being the presence of sufficient in-state business activity to indicate a purposeful enjoyment of the benefits and protections of that state's law." At 726. *See also Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184 (5th Cir. 1978).[23]

In *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974)[24], this court

23. In both *Benjamin* and *Charia*, this court found that in personam jurisdiction should not be exercised over the defendant because the requirements of due process were not satisfied. The fact situations in *Benjamin* and *Charia* are similar in some respects to the facts in the instant case: all three cases involve the efforts of a Louisiana plaintiff to assert jurisdiction over a nonresident in a contract dispute. Nevertheless, there are critical differences which distinguish those cases from the instant case. Both *Benjamin* and *Charia* involved the sale of a boat to a Louisiana resident by a nonresident boatbuilder. In *Benjamin*, the negotiations were by mail; the contract was executed by mail; although the nonresident defendant knew that the home port of the vessel would be in Louisiana, the forum state, the sale at issue was defendant's only sale to Louisiana, and defendant never made repairs to the boat in Louisiana; although defendant did advertise in national magazines which were circulated in Louisiana, this court found that contact insignificant in the absence of sales activities or advertising in local media; and finally the independent firm, which defendant arranged to inspect the boat after plaintiff's complaints, was found by this court not to be acting in an agency or employee capacity for defendant. The two additional facts which were present in *Charia* were: first, that the defendant arranged for the delivery of the boat to Louisiana, the forum state; and second, the defendant had sold three additional boats to Louisiana residents over a five-year period. In both cases, the court found the sales to Louisiana residents to be isolated sales which did not imply purposeful enjoyment of the benefits and protections of Louisiana law on the part of the nonresident defendants. The *Charia* court noted "[t]his is not a case where defendant had supplied its product to the forum state in large quantities over a lengthy period of time." 583 F.2d at 189.

The instant case, by contrast, involves an ongoing business relationship between Sapag and Standard Fittings, a relationship which contemplated continuing and substantial sales of Sapag's products and the management and operation of an exclusive distributorship for Sapag's products by Standard Fittings. In addition, Sapag representatives made three visits to Louisiana, two in furtherance of the business dealings between the parties, and the third involving a visit to another Louisiana company which resulted in Standard Fittings' learning that Sapag was interested in seeking an outlet for its products.

24. This court, in *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980), recently reaffirmed and again applied the principles expressed in *Product Promotions v. Cousteau*. In *Southwest Offset*, the plaintiff (Texas printer, which "manufactured" telephone directories for defendant) sued defendant (Alabama publisher of telephone directories, which purchased the printing services of the plaintiff) in Texas on a series of contracts. Finding the case controlled by *Product Promotions*, we reversed the district court's dismissal for want of personal jurisdiction. Although defendant Hudco operated in Alabama and Mississippi only and no one associated with Hudco ever came to Texas in connection with the orders placed with Southwest, we found that Hudco had sufficient contacts with Texas to make it amenable to the personal jurisdiction of Texas courts. Hudco's contacts with Texas included the following:

(1) Hudco placed repeated orders in writing or over the phone after Southwest's original solicitation of Hudco's business through Southwest's sales representatives in Alabama; the orders were accepted by Southwest in Texas; the contracts were governed by Texas law;

(2) Payment for the orders was to be made at Southwest's office in Dallas, Texas, and Hudco in fact mailed some payments to Dallas;

(3) As a part of the printing process, Hudco mailed to Southwest's office camera-ready copy of the telephone directories;

described a two-part test for determining whether the exercise of in personam jurisdiction would deprive a defendant of due process: "First, 'there must be some minimum contact with the state which results from an affirmative act of the defendant,' *i. e.*, purposeful activity. Secondly, 'it must be fair and reasonable to require the defendant to come into the state and defend the action.'" 495 F.2d at 494. In a footnote to this two-part test, the court identified several factors which various courts have used in determining whether the exercise of personal jurisdiction over a nonresident corporation comports with due process: the quantity of contacts, the nature and quality of the contacts, the connection of the cause of action to the contacts, the interest of the forum state in providing a forum for its residents, the convenience to the parties, and the nature and character of the business. 495 F.2d at 494 n.17.

Further explaining the first part of the two-prong test, the court in *Product Promotions* stated that purposeful activity of a defendant within the forum state implies that there must be *some* activity by the defendant and that it must "support an inference that the nonresident defendant purposefully availed himself of the benefits of conducting business in the forum." 495 F.2d at 495. The court went on to say that "even if the defendant performs no physical act within the State, activities outside the State can provide adequate contacts if they have reasonably foreseeable consequences within the State." 495 F.2d at 496. And finally, with respect to the purposeful activity prong of the test, the court said, "[t]he operative consideration is that the defendant's contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise." 495 F.2d at 496.

Product Promotions refined the second prong of the test which demands that it not be "unfair or unreasonable to require the nonresident defendant to defend the suit in the forum." 495 F.2d at 497–98. Among the factors to be considered in evaluating this part of the test are "the interest of the state in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and basic equities." 495 F.2d at 498.

THE DECISION

[3] Applying the foregoing principles, we hold that the activities of Sapag, in combination, bring Sapag within the boundaries of the Louisiana Long-Arm Statute and the principles of due process, and thus subject it to the jurisdiction of the Louisiana courts. We summarize Sapag's activities as follows:

(1) In late 1973, Sapag's Frederick and LeLievre visited another Louisiana company, seeking an outlet for Sapag products. As a result of that visit, Standard Fittings learned that Sapag was seeking an American outlet for its products;

(2) In January, 1974, Frederick mailed Sapag catalog and samples to Standard Fittings in Louisiana;

(3) An agreement, signed in Paris on February 19, 1974, was reached between the parties which contemplated continuing and substantial sales of Sapag products to Standard Fittings. It provided that Standard Fittings, which has its principal offices and manufacturing facilities in Opelousas, Louisiana, would become exclusive distributor of Sapag products in North America. As such, Standard would manage sales and distribution of Sapag products and Sapag would, at Standard's direction, ship its products anywhere in the world except Europe;

(4) Correspondence by letter and telex was exchanged between Frederick on Sa-

(4) Hudco returned corrected proofs to Southwest;

(5) The books were printed and shipped to Hudco F.O.B. Dallas;

(6) All the directories which are the subject matter of this suit were printed in Texas and Hudco knew that Southwest's only printing plant was in Texas.

See also Gold Kist, Inc. v. Baskin-Robbins Ice Cream, 623 F.2d 375 (5th Cir. 1980).

pag's behalf and representatives of Standard Fittings subsequent to the Paris agreement;

(5) In June, 1974, Frederick visited the Standard Fittings plant in Opelousas;

(6) In February, 1975, Sapag's LeLievre and Patteeuw visited the Louisiana plant and discussed the agreement between Standard Fittings and Sapag and problems that had arisen in connection with that agreement;

(7) Sapag made delivery of some of its product pursuant to its agreement with Standard Fittings;

(8) Standard Fittings arranged for a bank letter of credit in favor of Sapag through a New Orleans, Louisiana, bank.

These activities all related to the business relationship developed between Sapag and Standard Fittings and to the agreement which is the subject of Standard Fittings' suit. The early activities of Sapag in Louisiana, including the Fall, 1973, visit to Louisiana by Sapag agents, were to promote its product. Later Sapag engaged in activities, including on two occasions activities by Sapag agents in the State of Louisiana, to further performance of the agreement with Standard Fittings and to negotiate difficulties that had arisen under the agreement. The agreement itself contemplated continuing and substantial sales of Sapag products. The agreement contemplated performance by Standard Fittings in Louisiana by payment to Sapag through a Louisiana bank and by management of the exclusive distributorship of Sapag products.

We hold that the nature and quality of these contacts—having as their purpose the establishment of the Louisiana based company as the exclusive distributor for Sapag's products in North America—reveal the kind of purposeful activity which has been held to constitute sufficient minimum contacts. Sapag has purposefully availed itself of the privilege of conducting activities in Louisiana. We are inescapably drawn to the conclusion that the agreement entered into and the combined activities of Sapag show that it "transacted business" in Louisiana within the meaning of the Louisiana Long-Arm Statute, and demonstrate sufficient minimum contacts with the State of Louisiana to justify the exercise of personal jurisdiction over Sapag under the due process analysis. Sapag reasonably should have anticipated being haled into court in Louisiana.

We hold, further, that it is not unfair or unreasonable to require Sapag to defend a suit in Louisiana. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d at 497–98. Sapag would have us believe that this dispute can only be litigated fairly in France. But we will not discount the interests of the Louisiana plaintiff so easily. Sapag, which has deliberately carried out business activities in Louisiana in connection with its avowed purpose of establishing an American corporation as an outlet for the distribution of its products in the U.S. and elsewhere in North America, cannot insist that it is amenable to suit only in France. We acknowledge that France may well have an interest in providing a forum for resolution of the dispute between these two parties. Similarly, however, the United States, and particularly Louisiana, have an interest in providing a forum. The parties involved here operate substantial businesses. The agreement between Standard and Sapag contemplated many thousands of dollars worth of sales annually. The State of Louisiana clearly has an interest in providing a forum for litigating a breach of a major contract[25] which proposed to establish a Louisiana based company as the exclusive distributor in North America for Sapag's products.

While it may be less convenient for Sapag to defend this suit in Louisiana, we find no reason why such inconvenience to Sapag should outweigh the inconvenience to Standard Fittings of prosecuting the suit in France, in light of Louisiana's interest in

25. We decline to attach special significance to the amount of damages at issue in this lawsuit, *i. e.*, over $2,600,000. We note simply that the record shows that the agreement involved thousands of dollars worth of sales and a potential exclusive distributorship.

providing a forum and Sapag's purposeful acts availing itself of the benefits of conducting business in Louisiana. *See Product Promotions v. Cousteau*, 495 F.2d at 495.[26]

The judgment of the district court dismissing the complaint against Sapag is accordingly

REVERSED AND REMANDED.

STANDARD FITTINGS COMPANY

v.

SAPAG, S.A.

Civ. A. No. 76-0473.

United States District Court,
W. D. Louisiana,
Opelousas Division.

Nov. 30, 1977.

Louisiana corporation brought action against French corporation to recover for alleged breach of contract. The District Court, Nauman S. Scott, Chief Judge, held that: (1) fact that various messages had been sent by the French corporation to the Louisiana corporation and that the two principal officers of French corporation had visited the Louisiana corporation's facilities and had discussed business over a period of two days did not show that the French corporation had transacted business within Louisiana, and (2) exercises in personam jurisdiction over the French corporation would offend due process.

Dismissed.

1. Federal Courts ⇐34

Plaintiff has the burden of proving jurisdiction.

2. Federal Courts ⇐76

In determining whether court may exercise in personam jurisdiction over the defendant, the court must initially determine if the cause of action arose from the transaction of business within the state; if that is found, there must be a secondary determination as to whether the imposition of in personam jurisdiction of the state over the foreign defendant would transgress the bounds of due process; the absence of one factor precludes in personam jurisdiction regardless of the presence of the other.

3. Federal Courts ⇐84

Fact that foreign corporation had sent various forms of communication, including telex messages, to the plaintiff in Louisiana and that the remittance for goods shipped under the contract originated and was made upon banks in Louisiana was insufficient to show that the corporation was transacting business within Louisiana and thus subject to in personam jurisdiction in that state. LSA-R.S. 13:3201.

4. Federal Courts ⇐79

Fact that contract upon which suit was based contemplated that a substantial number of acts necessary to its performance would be done and carried out in Louisiana did not show that the foreign corporation had transacted business in the state of Louisiana so as to be subject to in personam jurisdiction there. LSA-R.S. 13:3201.

5. Federal Courts ⇐84

Since the agreement between the parties stipulated that foreign corporation's performance by shipment of goods would terminate by their delivery in Houston or New York, fact that contract being sued upon may have contemplated the placing of purchase orders, the payment for goods, and the receipt of goods in Louisiana did not show that the corporation was transacting business in Louisiana so as to be subject to in personam jurisdiction there. LSA-R.S. 13:3201.

6. Federal Courts ⇐84

Fact that two principals of foreign corporation made a trip to Louisiana and visited the plaintiff's facilities and discussed business did not show that the foreign corporation had transacted business in Louisiana so as to be subject to in personam jurisdiction there in an action arising out of the contract being discussed. LSA-R.S. 13:3201.

7. Constitutional Law ⇐305(6)

Any exercise of in personam jurisdiction over foreign corporation on the basis that two of its principal officers had spent two days in Louisiana discussing business, but not engaging in commercial transactions, would offend due process.

Leslie J. Schiff, Sandoz, Sandoz & Schiff, Opelousas, La., for plaintiff.

Rutledge C. Clement, Jr., Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for defendant.

RULING ON MOTION

NAUMAN S. SCOTT, Chief Judge.

This matter is before the court on a motion to dismiss for lack of in personam jurisdiction filed by SAPAG, S.A. (defendant). Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332.

Standard Fittings, a Louisiana domiciliary, alleges in its petition that the defendant, a French domiciliary, has breached an exclusive distributorship contract between the parties. Defendant denies plaintiff's contention as to the nature of the contract and avers that it was only an "agreement to agree" sometime in the future. In any event, interpretation of the agreement is not in issue at this time. The present inquiry relates specifically to defendant's motion to dismiss. Defendant's motion is predicated upon its contention that it is not amenable, under the Louisiana Long Arm Statute[1] and principles of constitutional due process, to the personal jurisdiction of a Louisiana tribunal.

Factors giving rise to the presence or absence of in personam jurisdiction are insusceptible of general application and consequently must be analyzed upon the singular basis of their presentation to the court. *North Central Utilities, Inc. v. Consolidated Pipe & Supply, Inc.*, 62 F.R.D. 676 (W.D.La. 1974); *Drilling Engineering, Inc. v. Independent Indonesian American Petroleum Co.*, 283 So.2d 687 (La.1973). The facts relevant to defendant's motion were determined from pleadings, memoranda, affidavits, attachments, and correspondence on file in the record.

The initial contact between the parties was made on January 22, 1974 when plaintiff's Sheldon Courville, in Opelousas, telephoned defendant's L. L. Fredrick in New Jersey and made inquiries about SAPAG products. As a result of this conversation certain catalogs of the defendant were sent to the plaintiff.[2] In February 1974 the President of Standard Fittings, Irwin Davlin, traveled to France and conducted negotiations with L. R. Guillemin and R. Patteeuw of SAPAG, which negotiations resulted in an alleged agreement that is the object of this lawsuit. In March 1974 the office of plaintiff's K. E. Vreeland placed a call to Fredrick resulting in the shipment of more catalogs to the plaintiff. In June 1974 Fredrick visited plaintiff's factory in Opelousas, Louisiana; it is unclear what business, if any, was conducted on this vis-

1. L.R.S. 13:3201.

2. Letter from L. L. Fredrick to Sheldon Courville dated January 22, 1974.

it.[3] In September 1974, Davlin returned to France, apparently to amend certain portions of the agreement. The agreement stipulated that SAPAG would ship the goods to Houston or New York, where title would shift to the plaintiff. The agreement also required Standard Fittings to obtain a letter of credit in favor of the defendant. This was done through a New Orleans bank. In February 1975 George Lelievre and R. Patteeuw visited the Standard Fittings plant in Opelousas for a day; it is unclear what business, if any, was conducted on this visit.

[1] Plaintiff has the burden of proving jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir. 1973). Unless a defendant possesses certain minimum contacts with a forum, the proper place of suit is his domicile. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *Riverland Hardwood v. Craftsman Lumber Co.*, 239 So.2d 465 (La.App.1970). The contacts with the foreign forum must be such that "[defendant must] be found to have purposefully enjoyed the benefits and protection of Louisiana law." *Benjamin v. Western Boat*, at 729.

The vehicle whereby in personam jurisdiction is extended over foreign domiciliaries in Louisiana is the Louisiana Long Arm Statute, L.R.S. 13:3201(a):

> "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresidents (a) transacting any business in this state; . . ."

As indicated above, the relating elements are a cause of action that arises out of the transaction of business in Louisiana. But this is only the threshold barrier. Another obstacle must be traversed before the defendant will be bound by a judgment in a foreign forum. The second barrier consists of constitutional due process considerations:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of the court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of the state." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 319, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

[2] As the foregoing indicates, it is incumbent upon the court to initially determine if the present cause of action arose from the transaction of business within Louisiana. Once this is found, there must be a secondary determination made as to whether the imposition of in personam jurisdiction in Louisiana over the foreign defendant would transgress the bounds of due process. The scope of both are not coterminous. Thus the absence of one factor would preclude in personam jurisdiction regardless of the presence of the other. 2 Moore's Federal Practice § 4.25(5).

3. The status of L. L. Fredrick in his relationship with the defendant merits some attention. It appears from his affidavit and other material in the record that L. L. Fredrick was a "manufacturer's representative" who promoted the products of those with whom he contracted. His arrangement with SAPAG required him to expend 50 days a year in promotion of SAPAG products. However, it appears he possessed neither actual nor apparent authority to engage in substantive negotiations for SAPAG. This conclusion is borne out by the fact that Davlin journeyed to France to negotiate with the SAPAG officers, rather than attempt to contract with Fredrick.

Plaintiff, in Paragraph 2 of its petition, proffers a number of incidents which it contends constitute the transaction of business by the defendant in Louisiana:

"SAPAG's contacts within the State of Louisiana include the following: (a) Defendant's representative, L. L. Fredrick, visited Opelousas, St. Landry Parish, Louisiana, on at least one occasion during 1974, to discuss the subject matter herein sued upon. (b) Goods manufactured by SAPAG were shipped into Opelousas, Louisiana, pursuant to the contract upon which the suit is based. (c) The contract upon which this suit is based contemplated that a substantial number of acts necessary to its performance would be done and carried out in Louisiana, including the placing of purchase orders, the payment for goods, and receipt of goods. (d) Defendant's representatives Messrs. Lelievre and Patteeuw conducted negotiations personally in Opelousas, Louisiana during 1975 which negotiations were in connection with the contract herein sued upon. (e) Defendant SAPAG has had repeated contact with Standard representatives in Opelousas, St. Landry Parish, Louisiana, by various forms of communication including numerous telex messages, and various other forms of correspondence all of which was sent pursuant to the contract herein sued upon. (f) Remittance for goods shipped under this contract originated and was made upon banks in St. Landry Parish, Louisiana. (g) The acts described hereinabove are not intended to be an exclusive list of the contacts of SAPAG within the State of Louisiana, but represent merely a sampling of contacts."

[3-6] The above factors necessitate a decision by the court as to whether their existence constitutes a "transaction of business". Sections (e) and (f) relate to the transmission of correspondence between Louisiana and France, and the remittance for goods made through Louisiana banks. In the *Benjamin* case there were more than 50 instances of correspondence between Louisiana and Washington, and the plaintiff there made 7 payments through New Orleans banks totaling $127,373.33. However, the court in *Benjamin* declined to characterize this activity as the transaction of business. *Benjamin* would also govern the letter of credit established by the plaintiff at the New Orleans bank. Section (c) is couched in the future tense and thus is inappropriate for present consideration. However, even if the acts in (c) had occurred, we do not believe their impact would exceed in consequence for our purposes those listed in (e) and (f). The agreement between the parties stipulates that SAPAG's performance by the shipment of goods would terminate by their delivery in Houston or New York. Hence, any presence in Louisiana of SAPAG manufactured products would be traceable solely to the actions of the plaintiff. We do not believe such unilateral action is a valid basis upon which to confer jurisdiction. The capacity of L. L. Fredrick, specifically as it relates to his inability to contract on defendant's behalf has been previously discussed. This inability prohibits the conclusion that the occasion of Fredrick's visit to Opelousas resulted in the transaction of business. The visit of Messrs. Lelievre and Patteeuw to Opelousas provides the most significant incident in favor of finding jurisdiction. It is obvious by correspondence subsequent to the visit that the business was discussed at that time. However, the Long Arm Statute is phrased in terms of "business transactions", not "business discussions".[4] The former presumes something more than mere discussion, rather it contemplates the finalization of a negotiation process. The only transaction apparent from the record is the agreement of 1974 with its supplement. Further, the affidavit of Lelievre

4. The case of *Kalvar v. General Micrographics, Inc.*, 318 So.2d 71 (La.App.1975), relates an incident remarkably similar to the present one. In *Kalvar*, the President of the non-resident defendant came to Louisiana to inspect the plant of the plaintiff, and "contract terms and price were discussed". 318 So.2d at 72. However, the court in *Kalvar* noted that no formal agreement was confected during the Louisiana visit and subsequently held that no Long Arm jurisdiction would lie over the defendant in that case. The emphasis of *Kalvar* is vitiated some-

states that no commercial transactions were consummated during the Opelousas visit and plaintiff has not afforded any substantive indication otherwise.

Since the facts, as presented to the court, display no transaction of business in Louisiana out of which the present cause of action arose, the Louisiana Long Arm Statute is an inappropriate vehicle for the imposition of in personam jurisdiction over the defendant.

The principle of constitutional due process, as it relates to issues concerning non-resident parties to lawsuits is animated by a notion of fairness:

> "The governing principle is the fairness of subjecting a defendant to suit in a distant forum. Only if the nonresident defendant has such 'minimum contacts' with the state that the maintenance of the suit does not offend a traditional notion of fair play and substantial justice, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), or if the defendant has performed some act 'by which (it) purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws', *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), may this forum, consistently with due process, extend the Long Arm to embrace it." *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973).

[7] As the above illustrates, there exists no series of objective touchstones whereby a court may declare, with complete assurance, that in personam jurisdiction over a certain non-resident party exists or not. We believe it is left to the judgment of the court in each instance, to assess the activities of the non-resident in the forum jurisdiction, and to determine if those activities constitute such a "presence" in the forum that it is not "unfair" to conclude that the non-resident has vouchsafed his right to be sued only at his own domicile. The only incidents of real presence had by the defendant in Louisiana were the visits of L. L. Fredrick in June 1974 and the visit of Lelievre and Patteeuw in February of 1975. Is it fair to require a non-resident defendant to travel many thousands of miles to defend a suit because of a maximum of two days spent by its representatives in a foreign forum where no commercial transactions took place? We submit it is not.

We therefore conclude that the plaintiff has failed to display affirmatively the presence of in personam jurisdiction over the defendant, SAPAG, in this state. For the aforementioned reasons, it is hereby ORDERED, ADJUDGED AND DECREED that the motion to dismiss filed by defendant SAPAG be hereby GRANTED. Defendant should submit a judgment consistent with this ruling within five days of date hereof.

what by the fact that the defendant there was a non-resident buyer, whereas in the instant case we have a non-resident seller. Jurisprudential distinctions as to the acquisition of in personam jurisdiction over non-residents, based solely on their status as a buyer or seller, has been subject to criticism by Law Review commentators. 34 La.L.Rev. 691 (1974); 18 Loy.L.Rev. 452 (1972); 45 Tul.L.Rev. 1081 (1971).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-3486

STANDARD FITTINGS COMPANY,

Plaintiff-Appellant,

versus

SAPAG, S.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

Opinion September 11, 1980
(October 30, 1980)

Before Gee, Tjoflat and Anderson, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rules 5 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

APPENDIX C

CORRECTED COPY

NO. 80-1443

Office-Supreme Court, U.S.
FILED
JAN 26 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

SAPAG, S.A., PETITIONER,

v.

STANDARD FITTINGS COMPANY,
RESPONDENT.

PETITION BY SAPAG, S.A. FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A
WRIT OF CERTIORARI

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Rule 28.1 Certificate

This statement is provided in accordance with Rule 28.1 of the Rules of the United States Supreme Court:

(1) The parent company of the Petitioner, SAPAG, S.A., is PONT–A–MOUSSON S.A. of Nancy, France.

(2) The Petitioner, SAPAG, S.A., has no wholly owned subsidiaries; the Petitioner's only subsidiary is a Spanish corporation, SAPAG, S.A., 50 percent of the outstanding shares of which are owned by the Petitioner.

(3) Approximately 95 percent of the stock of the Petitioner's parent company, PONT–A–MOUSSON S.A., is held by SAINT–GOBAIN–PONT–A MOUSSON, a French corporation.

Respectfully submitted,

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Appendix A-1

STANDARD FITTINGS COMPANY

Plaintiff - Appellant,

v.

SAPAG, S.A., Defendant - Appellee.

No. 77 - 3486.

United States Court of Appeals,

Fifth Circuit

September 11, 1980.

Before GEE, TJOFLAT and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Appellant Standard Fittings, a Delaware corporation, is engaged in the business of manufacture, purchase, sale and distribution of high-pressure fittings, valves, unions and other items. Its business is centered in Opelousas, Louisiana. Appellee Sapag, S.A. is a French manufacturer of high-pressure fittings. It has not qualified or been licensed to do business in Louisiana. Appellant brought suit in a Louisiana state court against appellee for alleged breach of an exclusive distributorship contract between the parties. The case was removed to federal district court pursuant to 28 U.S.C. § 1441 (1976). Subject matter jurisdiction is predicated on diversity of citizenship.

We are asked in this appeal to review the district court's dismissal of the case for lack of in personam jurisdiction over appellee Sapag. The district court held that Sapag was not amenable, under the Louisiana Long-Arm Statute and principles of constitutional due process, to the personal jurisdiction of a Louisiana court. *Standard Fittings Co. v. Sapag, S.A.* 448 F. Supp. 426 (W.D. La. 1977). Because we conclude that both Louisiana law and the due process clause of the fourteenth amendment to the Constitution permit the exercise of in personam jurisdiction over Sapag, we reverse and remand to the district court for trial.

FACTS

Our inquiry into the applicability of the Louisiana Long-Arm Statute and the due process implication of the exercise of in personam jurisdiction over Sapag is fact sensitive one. The facts relevant to Sapag's motion to dismiss for lack of in personam jurisdiction derive from the pleadings, memoranda, affidavits, attachments and correspondence on file in the record.

It appears from the record that Sapag's first contact with the forum state, Louisiana, came with the visit[1] in the fall of 1973

1. The district court made no mention of this contact of Sapag representatives with Louisiana, probably because of its legal conclusion with respect to the meaning of "transacting business", a conclusion which we discuss and disavow, *infra*, in section 1 b. of this opinion.

of L. L. Frederick,[2] marketing consultant for Sapag, and Georges

2. The nature of the relationship between Mr. Frederick and Sapag is characterized quite differently by the parties. Sapag contends that Frederick had no authority to contract on its behalf. Standard Fittings claims that Frederick had both actual and apparent authority to bind Sapag. The affidavit of Leonard L. Frederick, R. 55-56, reveals that, during the time relevant to this case, Frederick was under contract with Sapag to promote Sapag's products. Frederick was obligated to spend approximately fifty days per year of his time on Sapag's behalf. Frederick swears,"[d]uring the approximately five years the contract was in effect, I served Sapag by introducing the company and its product to various engineering contracting companies in the United States and by conveying information to such companies about the Sapag products, but I have never made a contract on their behalf and have never received any legal process on their behalf except for the Citation and Petition in this case." Correspondence in the record between Frederick, based in Whippany, New Jersey, and Standard Fittings in Opelousas shows that Mr. Frederick did indeed act on behalf of Sapag in the business dealings between Sapag and Standard Fittings. See Record 29, 70, 71, 72. Mr. Frederick wrote his letters to Standard Fittings on stationery with the heading "SAPAG" in bold letters at the top center and

U. S. Corresponding Office
L. L. Frederick
15 Crestview Terrace
Whippany, New Jersey 07981

at the top right. While Mr. Frederick may not have had authority to contract on behalf of Sapag, an issue we need not reach, it is clear, from the letters and telex messages exchanged between Frederick and representatives of Standard Fittings, that Frederick's role was to facilitate the ordering, shipment and delivery of products manufactured by Sapag for Standard Fittings under the agreement which is the subject of this suit.

LeLievre, sales manager of Sapag (R.180) to the office of Dixie Supply Mill Company in New Orleans, Louisiana. While the visit itself is undisputed, its nature and purpose are described differently by the parties. LeLievre, in an affidavit filed in support of Sapag's motion to dismiss, swears that this visit was "a brief stop. . . to investigate any possibility of cooperation as a follow-up of a price inquiry for valves that Dixie Mill sent to Sapag; no agreement was reached. Following this abbreviated conference, affiant and consultant left the State of Louisiana the same day without further conferences with or visits to other fittings dealers in that state." (R.180). Mike Cahn, president of Dixie Mill Supply Co., Inc., swears, in pertinent part, in his affidavit filed on behalf of Standard Fittings:

> 2. That sometime during 1973, Mr. L.L. Frederick and Mr. G. LeLievre called upon Dixie Mill Supply Co., Inc. in New Orleans at its offices in New Orleans, Louisiana, for the purpose of soliciting business. That Frederick and LeLievre on behalf of Sapag asked affiant to take on the Sapag line as a distributor for the company in the Southern part of the United States.
>
> 3. That affiant after the visit by Sapag representatives in his plant in New Orleans, Louisiana, informed Standard Fittings Company's president, Irwin H. Davlin, of the fact that Sapag was interested in a United States outlet for its products.

(R.160). The affidavit of Jules Cahn, Vice-President of Dixie Mill Supply Co., Inc., is to the same effect (R.151). The district court failed to acknowledge this Fall, 1973, contact between

Sapag and the State of Louisiana. We find that omission significant because the Cahn affidavits swear that LeLievre and Frederick came to Louisiana soliciting business on behalf of Sapag. LeLievre's affidavit, while indicating that the visit was a follow-up to a price inquiry, does not deny that Sapag had asked the Cahns to take on the Sapag line as a distributor for the Southern part of the Unites States. A letter written by Frederick to Jules Cahn and filed subsequent to the filing of the Cahn affidavits referred to above supports the contention that Sapag was interested in importing its product to the United States, and specifically to New Orleans.[3] The Cahn affidavits are also

3. The letter dated May 2, 1973, reads as follows:

Mr. Jules Cahn
Dixie Mill Supply Co.
P. O. Box 52005
New Orleans, Louisiana 70150

Dear Mr. Cahn:

As suggest [sic] by mr[sic] Mike E. Cahn in a recent telephone conversation, we are enclosing our catalogs SB71R on Forged Steel Fittings, SR72R and Forged Steel Valves and SC 72RJ on Safety Relief Valves.

All valves and fittings are made strictly to American specifications.

We make two lines of valves, the hancock under license from Dresser which we cannot import to the U.S.A. and the Chervet line (our own) which *we would like to import to the U.S.A.* The quality of these two valves are [sic] on a par and a picture of the

uncontradicted in their suggestion that Standard Fittings learned about Sapag through the Cahns as a result of the 1973 visit by Sapag's Frederick and LeLievre. The affidavit of Irwin Davlin, President of Standard Fittings, supports this view. Davlin swears that "it was as a result of this trip into Louisiana [the Fall, 1973, visit of LeLievre and Frederick] that Standard Fittings Company learned of the willingness of Sapag to sell its French made products in Louisiana . . . ." (R. 138).

The relationship between Sapag and Standard Fittings began when Shelton Courville of Standard Fittings in Opelousas and L.L. Frederick on behalf of Sapag in New Jersey spoke over the telephone about Sapag's products. As a result of the conversation, Frederick arranged to have a catalog and additional information, including samples, sent to Standard Fittings. (See letter from Frederick to Courville of January 22, 1974, at R. 140).

In February, 1974, Irwin Davlin, president of Standard Fittings, went to France where he met and negotiated with L.R. Guillemin and R. Patteeuw of Sapag. These three signed an agreement dated February 19, 1974, which is the subject of this

Note 3- Continued

Chervet valve is shown inside the back cover of SR72R. If you would like to check out the prices on a representative container or half container lot, that is 37,000 or 20,000 lbs. give us the sizes you would like and the trim and we will give you a CIF price and weight study for shipment to *New Orleans*.

Please let us hear from you as we believe we can give you a very satisfactory price arrangement.

Very truly yours,
L. L. Frederick

Encl. Cats.

(emphasis added); (R. 165).

suit.[4] The agreement[5] contemplated a substantial volume of business.[6] It provided that Standard would order 27,500 unions for each month of 1974, beginning in May, and that if Standard purchased a certain average number of unions from Sapag in 1974, Sapag would give Standard an annually renewable exclusive distributorship for unions (in excess of 350,000 annually) and fittings (approximately 420,000) beginning in 1975. Sapag agreed to accept no further orders for unions or fittings from the USA or Canada for the balance of 1974 except for previous commitments. The agreement also contemplated the grant to Standard Fittings of an exclusive representation of Sapag valves in North America. The agreement provided for shipment by Sapag of its products CIF New York City or Houston, and it provided that "Standard may sell and Sapag on request will ship for Standard to any port of the world except Europe." It required that Standard Fittings obtain a bank letter of credit in

4. Record 12-15.

5. The question whether this agreement was binding, while critical to the merits of this case, is not crucial to the determination of the issue before us. What is important for our purposes is what actions occurred in furtherance of the agreement, what the agreement of the parties contemplated and what performance actually occurred. *See Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1232 (5th Cir. 1973), where we noted that in order to show that the forum's jurisdictional statute is satisfied, plaintiff need only show a prima facie cause of action.

6. The precise dollar amounts involved are not relevant to our inquiry. However, the order forms included in the record indicate monthly amounts ranging from approximately $48,000 to $63,000.

favor of Sapag.[7] Finally, the agreement recited that its general purpose was "to develope [sic] a relationship whereby Standard its assignee shall be exclusive North American distributor for Sapag."[8]

Following the agreement in Paris, Frederick corresponded with Standard Fittings Co. by letter (R. 141; 72) and telex (R. 142; 73). Frederick arranged to visit Standard Fittings' plant and to meet with Mr. Davlin on the morning of May 10.[9] The scheduled

7. This was done through the First National Bank of Commerce in New Orleans and under the terms of the guarantee, payment was made in New Orleans, Louisiana, by Standard Fittings Company to Sapag for all shipments of goods. Affidavit of Davlin, item 11, R. 138.

8. Record 15.

9. Frederick's telex Message reads in pertinent part as follows:
3 MAY 1974, ATTN. MR. DAVLIN, REFERENCE TO YOUR INQUIRY FOR VALVE SOME TWO WEEKS AGO AND OUR CONVERSATION TODAY. THE FOLLOWING IS OUR BASE PV . . . (SCHEDULE OMITTED).
THE ABOVE EXPRESSED IN U.S. DOLLARS FOR FRENCH PORT. INVOICES WILL REFLECT THE QUARTERLY ADJUSTMENT OF PRICE AT THE TIME OF THE SHIPMENT. LONTG [sic] TERM DELIVERIES UNDER A PROJECTED SCHEDULE CAN START ON A MONTHLY BASIS STARTING 1 ST JANUARY 1975. WE CAN GIVE YOU THE FOLLOWING ITEMS DURING THE MONTH OF OCTOBER WHICH AMOUNT TO ABOUT A HALF OF A CONTAINER (10 TONS). . . SCHEDULED OMITTED.

NO SHIPMENT OF 1½ AND 2" . . . (SCHEDULE OMITTED). WILL BE PACKED IN LIGHT BOXES IN THE CONTAINER. ADD TWO PERCENT TO TOTAL PRICE FOR CIF SHIPMENT TO HOUSTON.

meeting was apparently delayed, but Mr. Frederick did in fact visit the Standard Fittings plant in Opelousas in June, 1974, "[p]ursuant to his promotional endeavors relative to the North American market . . . ." (Affidavit of Jacques Oyer, president of Sapag, S.A., R. 110). [10]

In September, 1974, Davlin again went to France and certain portions of the agreement between Standard Fittings and Sapag were amended. [11]

In February, 1975, Sapag's LeLievre and Patteeuw visited the Standard Fittings plant in Opelousas. LeLievre and Patteeuw arrived in Opelousas on the evening of February 6, 1975, and had dinner at Mr. Davlin's home. (Oyer affidavit, R. 110). The next day, February 7, they met with Davlin at the Standard

Note 9 - Continued

I SHALL PLAN TO VISIT YOUR PLACE ARRIVING IN THE EVENING OF MAY 9 AND SPEND THE MORNING OF 10 MAY WITH YOU AT THE OFFICE.
WE CAN FURTHER OUR DISCUSSION OF THIS PROPOSAL THEN.
BEST REGARDS. L. L. FREDERICK, SAPAG, U.S.A. WIPY

10. The district court found that it was "unclear what business, if any, was conducted on this visit." *Standard Fittings Co.v. Sapag S.A.*, 448 F. Supp. 426, 427-8 (W.D. La. 1977). The telex message quoted in footnote 9, above, shows that Frederick contemplated further discussion of the business proposal discussed by Frederick and Davlin, a proposal apparently involving long-term delivery of valves to Standard Fittings, CIF shipment to Houston.

11. Davlin affidavit, R. 137; R. 16-18.

Fittings plant. They left Louisiana later that day. Letters [12]

12. These letters written by Mr. LeLievre to Mr. Davlin read as follows:

Mr. I. DAVLIN
President
STANDARD FITTINGS COMPANY
P. O. Box 1268
OPELOUSAS - LOUISIANA 70570
UNITED STATES
n/ref GL/HD
03/5334

Rosny, February 25th 1975

Dear Mr. Davlin,

Some time has already passed since Mr. Patteeuw and I had the pleasure of visiting with you in Opelousas.

Please accept my apologies for thanking you with such a delay for the kind welcome you extended to us in your house and in your plant.

Since we returned, we have been studying very carefully the various possibilities we have to supply you with material in accordance with the last conversation we had in your office and we expect to inform you of our position early next month.

We are also looking to the question also discussed in Opelousas of possibly purchasing 304 or 316L Stainless Steel Screwed Fittings from you if prices are attractive, and shall appreciate receiving up to date information or price list from you at your earliest convenience.

Hoping to find a satisfactory solution to our present problems, I remain,

Very Truly Yours
/S/ G. LELIEVRE
G. LELIEVRE

Note 12- Continued

Direction Commerciale
M.D. D'Alsace-Lorraine
Nois Rosny-Sous-Bois
Tel. 525-06-80+0808-94+
Telex22358 Sapag - Rosny

(March 14, 1975)

Mr. L. DAVLIN
President
STANDARD FITTINGS COMPANY
P. O. Box 1268
OPELOUSAS
Louisiana, U.S.A.

GL/AM 03/5336
m/mef.

Rosny, March 10th 1975

Dear Mr. Davlin,

Following our latest discussion in Opelousas and as indicated in letter dated 25th February, we have investigated what could be, presently, for SFC our very best possibilities of supply of unions and valves, both fields for which a cooperation was initiated in 1974.

Starting from that investigation, we have drafted a schedule of deliveries which is herewith attached and which we comment hereafter:

As far as forged steel valves are concerned, the one order for valves which you sent us in July 1974 has been partially delivered in October 1974 for one third of the quantities. The remaining two thirds could be made available by July and November 1975. The present trend of the international market being more and more for welded bonnet instead of bolted bonnet valves has led us to redirect our production to this type of equipment and consequently it is the welded bonnet model of valve which we could then supply to you.

In last july, we had quoted you prices in US $ when at that time the rate of exchange was 1 US $ = 4.90 FF. When expressed in

Note 12-Continued

FF our prices are unchanged but, you will understand that the US $ fluctuation and its present rate unfortunately do not allow us any longer for payment in that currency as in the past. Hence the reason of our quotation in french francs mentioned during our visit to Opelousas.

Furthermore, as was previously discussed, we have had much to our regret, to up-date the prices in connection with the still increasing cost of the raw materials and the attached schedule based on our tariff in effect in January 75 takes this into account. However, to lessen the consequences, please note that, quite exceptionally, the indicated prices will remain firm during the whole duration of the delivery period of the equipments shown in the schedule.

As for the unions we have shown separately the container which was scheduled for 1974 delivery in the corresponding order acknowledgement and the three other containers, i. e. four altogether, which we could ship to you up to the end of 1975. You will see that a container could thus be delivered every quarter. Concerning the prices, no modification would be brought upon the basis of our tariff in french francs for the first container, but the following one scheduled for delivery during the second quarter would bear the price increase we have been met with at the end of 1974 (see our net price list 216 AU herewith attached) and in the same way, the prices of the third and fourth quarters deliveries should be discussed and agreed upon respectively on the 1st of July and on the 1st of October prior to actual shipment. For reasons indicated above settlement should be made in french francs.

The letter of credit which you had kindly opened with the First National Bank of Commerce expires in a few days, its extension should be considered if, as we do hope, a cooperation on the above basis can be contemplated.

As we are "freezing" the offered equipments until the end of March, I am sure you will understand that any answer from you before that time would be more than appreciated and, looking forward to hearing from you and your acceptance of this proposed scheme, I remain, Dear Mr. Davlin,

Very truly yours,
/S/ G. LELIEVRE
G. LELIEVRE
General Sales Manager.

written by LeLievre to Davlin subsequent to the visit of Patteeuw and LeLievre to Opelousas make it quite clear that the agreement between Standard Fittings and Sapag had been the subject of discussion and negotiation during the visit.

Finally, it appears that Sapag actually delivered some quantity of its product (valves) to Standard Fittings.[13]

THE LEGAL STANDARDS

In determining whether Sapag is subject to in personam jurisdiction of the Louisiana courts and hence the federal court to which the action against it was removed, we follow a two-step analysis. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). We must determine, first, whether Sapag is amenable to service under the Louisiana Long-Arm Statute. Louisiana law controls this question. *Jetco Electronic*

13. See March 10, 1975, letter from Lelievre to Davlin. The district court assumed that the delivery of any of Sapag's product to Standard Fittings occured in Houston or New York, thereby terminating Sapag's performance. The district court thus found that the presence in Louisiana of any Sapag product was due to the action of Standard Fittings. We see no reason to disturb these findings. We note, however, that "jurisdiction does not depend on the technicalities of when title passes." *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980), *citing Eyerly Aircraft Co. v. Killian*, 414 F. 2d 591, 595-6 (5th Cir. 1969).

Industries, Inc, v. Gardiner, 473 F.2d at 1232; *Barrett v. Browning Arms Co.* , 433 F. 2d 141 (5th Circuit. 1970). If the requirements of the Louisiana Long-Arm Statute are satisfied, we must next apply federal law "to determine whether assertion of jurisdiction over the defendant comports with due process." *Jetco Eletronic Industries, Inc. v. Gardiner,* 473 F.2d at 1232 (5th Cir. 1973).

1. Long Arm Statute

We inquire first whether Sapag is subject to in personam jurisdiction under the Louisiana Long-Arm Statute. That statute, La. Rev.Stat.Ann. § 13:3201 (West), provides in pertinent part:[14]

14. The Louisiana Long-Arm Statute, as amended in 1977, reads in full as follows:

§ 3201. PERSONAL JURISDICTION OVER NONRESIDENTS

A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

(a) transacting any business in this state;

(b) contracting to supply services or things in this state;

(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

(d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; or

(e) having an interest in, using, or possessing a real right or immovable property in this state.

(f) non-support of a child or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state.

> Personal jurisdiction over nonresidents A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's
>
> (a) transacting any business in this state

The question we must address is: what is "transacting any business" in Louisiana under Louisiana law? The district court judge found that under the principles of *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), correspondence between Louisiana and France and the remittance for goods made through Louisiana banks could not be characterized as the transaction of business. He found that inability of Sapag's agent L.L. Frederick to contract on Sapag's behalf "prohibits the conclusion that Frederick's visit to Louisiana resulted in the transaction of business." Finally, he found that a business transaction under the statute "contemplates the finalization of a negotiation process." *Standard Fittings Co. v. Sapag, S. A.*, 488 F. Supp. 426, 429 (W.D. La.1977).

We think that the district court judge erred in his application of the law. Specifically, we think that the district

14. (continued)
While it is not clear that Standard Fittings is attempting to assert jurisdiction only under the provisions of section (a) of the Long-Arm Statute, we limit our inquiry to the applicability of that section as did the court below. Because we find the requirements of section (a) were met, we need not address whether section (b) of the Long-Arm Statute might apply in the case as well.

court judge has read too narrowly the jurisprudence of Louisiana with respect to the reach and the requirements of the Long-Arm Statute.[15] We find that Louisiana Long-Arm Statute was intended to reach to the limits of due process and that "transacting business" does not require finalization of the negotiation

15. The district court concluded that the only relevant business activity would be finalization of the contract in Louisiana for purposes of the Long-Arm Statute. This erroneous legal conclusion led to the further erroneous conclusion that Frederick's contacts in Louisiana on behalf of Sapag were irrelevant because he was an agent without authority to conclude contracts. The district court's determination that Sapag's other contacts with the forum state were irrelevant as well also appears to flow from this erroneous view of the requirements of the Long-Arm Statute.

We note further that in deciding that the requirements of the Louisiana Long-Arm Statute were not met, the district court relied heavily on *Benjamin v. Western Boat Building Corp., supra.* To the extent that the district court relied on *Benjamin* to elucidate the meaning of "transacting business" under the Louisiana Long-Arm Statute, that reliance was misplaced. The *Benjamin* case was decided exclusively on the basis of a due process analysis: the court declined to reach the question of whether the contacts with the forum there amounted to "transacting . . . business" under the Louisiana Long-Arm Statute. 472 F.2d at 725. The court, instead, measured the contacts between the defendants and the forum against the requirements of due process and found the contacts insufficient. Thus while we must consider *Benjamin* in resolving the issue before us, its value lies not in its interpretation of the meaning and requirements of the Louisiana Long-Arm Statute but rather in the light it casts on the requirements of due process.

process or authority to contract on the part of agents who engage in business activity within the forum state on behalf of defendant.

a. The Reach of the Long-Arm Statute

The comments of the Louisiana State Law Institute, published in connection with the 1964 Long-Arm Statute, indicate the statute's intended reach. Comment (a) reads:

Comments of Louisiana State Law Institute-1964

> (a) R.S. 13:3201 through 13:3207 were adopted on the recommendation of the Louisiana State Law Institute to permit the courts of this state to tap the full potential of jurisdiction in personam over non-residents permitted by *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945); and *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

Comment (d) reads:

> (d) "Transacting business", as used in Subdivision (a), is a term which is much broader than "doing business" as defined by earlier Louisiana cases, and the

> phrase "does * * * business" of Subdivision (d) conferring personal jurisdiction over a nonresident on a cause of action arising ex delicto or quasi ex delicito. *It is intended to mean a single transaction of either interstate or intrastate business, and to be as broad as the phrase "engaged in a business activity" of R. S. 13:3471(1).*

(emphasis added).

The Louisiana Court of Appeal has held that § 13:3201 was intended to permit the exercise of in personam jurisdiction to the full limits of due process. *Aucoin v. Hanson*, 207 So.2d 834 (La.App.1968); *Mayeaux v. Hughes*, 333 So.2d 273 (La.App.1976). We note that this court said in *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), that "it is unclear whether the Louisiana statute was intended to go to the permissible limits of due process in the exercise of in personam jurisdiction *in contract* cases . . . " (emphasis added) 472 F.2d at 725. This idea was repeated in *Charia v. Cigarette Racing Team, Inc.*, 583F.2d 184, 185 n.2 (5th Cir. 1978). The *Benjamin* court referred to a suggestion by a Louisiana commentator[16] that Louisiana courts restrict the

16. *See* Lewis, *Suing a Nonresident - the Reach of Louisiana's Long-Arm Statute, 19 La. B.J. 205 (1971).*

Long-Arm Statute to a narrower scope in contract cases as compared to tort cases. We reject that suggestion. The Louisiana courts have repeatedly stated without qualification that § 13: 3201 was intended to extend to the limits of due process. *Aucoin v. Hanson*, 207 So.2d 834 (La.App.1968); *Mayeaux v. Hughes*, 333 So.2d 273 (La. App.1976).[17]

17. The *Benjamin* panel mentioned several cases as possible support for a more limited jurisdictional reach in contract cases, but expressly declined to consider the question. We find that the cited cases do not support the distinction, and in any event the cases are all distinguishable from the instant case. In *Bowlero v. Allen* 205 So. 2d 196 (La.App.1967), the plaintiff (Louisiana corporation) sued defendant (Texas resident) in Louisiana for a declaratory judgment seeking to determine the plaintiff's legal responsibility to its co-plaintiffs on certificates of indebtedness acquired by defendant through series of endorsements. The defendant's only contact with Louisiana, the forum state, was that he sent demand letters to co-plaintiffs in Louisiana. The Louisiana court refused to exercise in personam jurisdiction because it found that the making of a demand for payments does not amount to transacting business and because the cause of action did not arise out of the mailing or receipt of demand letters.

In *Moore v. Evans*, 196 So.2d 839 (La.App.), *writ refused*, 250 La. 894, 199 So.2d 914 (1967), plaintiff (Texas resident) sued defendant (Louisiana resident) in Louisiana to have a judgment rendered in Texas (for plaintiff and against defendant) recognized. The suit in Texas had been on a note signed by defendant in Louisiana but payable in Texas. Refusing to find personal jurisdiction under the Texas statute proper, the Louisiana court said,"[there is no showing that defendant did anything in connection with the note sued on except signing it as a co-maker

More importantly, both the Louisiana Supreme Court and the Louisiana Court of Appeal, in cases decided after *Benjamin* and after the 1971 article by the Louisiana commentator, have similarly described the full reach of the statute in a contract setting. *Adcock v. Surety Research and Investment Corp.*, 344 So. 2d

Note 17 Continued

in Louisiana." There was evidence that defendant had made several trips to Texas on behalf of another company of which he was the director, but there was no showing whether that company and the company obligated under the note were the same. The court, deciding the case on the basis of due process, said, "plaintiff has not shown that defendant conducted any business in Texas so as to bring him within the *[International Shoe]* doctrine." 196 So.2d at 840.

In *Fidelity Credit Co. v. Bradford,* 177 So.2d 635 (La. App. 1965), B (Louisiana resident) was the maker of a promissory note payable V-M of Louisiana, and purchased by F. F sued B in Louisiana, and B sued V, an Oklahoma corporation. V was a wholesaler which sold central vacuum cleaner units to retailers in Louisiana but had no control over the subsequent sale of the units and otherwise had no contact with Louisiana. Although the Louisiana court refused to find personal jurisdiction, it drew no distinction between contract and tort cases for purposes of the exercise of in personam jurisdiction. Moreover, it expressly noted that the Louisiana Long-Arm Statute, was intended to be as broad as, though not broader than, due process would allow.

See also Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co., 259 La. 635, 251 So.2d 45 (1971) which is discussed in footnote 18.

969, 971 (La.1977); *Latham v. Ryan*, 373 So.2d 242 (La. App. 1979).[18] We are, therefore, confident that the Louisiana Long-

18. We observe, however, that there is a distinction drawn in Louisiana jurisprudence between the contacts sufficient for the exercise of in personam jurisdiction in a contract case involving a nonresident buyer as compared to a contract case involving a nonresident seller. *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*, 259 La. 635, 251 So.2d 45 (1971); *Kalvar Corp. v. General Micrographics*, 318 So.2d 71 (La. App.), *writ refused*, 322 So.2d 773 (La. 1975). That distinction, however, is a matter of due process, not the definition of "transacting any business." *Kalvar* at 73. The Louisiana Supreme Court in *Riverland* explains the differences between foreign purchasers and foreign sellers with respect to the due process clause: (1) interstate sellers should be aware that most states require them to go to the residence of the purchaser to sue on a claim arising from the transaction; (2) interstate sellers can usually travel more easily to foreign jurisdictions; (3) sellers accept the possibility that they will have to travel to foreign jurisdictions to enforce their rights as a risk of interstate business; (4) there is no reason for mail order purchasers to expect that they might be sued in a distant forum for failure to pay for an isolated purchase in a foreign state; (5) sellers usually are engaged in business for profit; (6) many buyers of goods from a foreign jurisdiction are consumers satisfying personal needs or pleasure and not pursuers of profit; (7) buying is not traditionally the same as doing business; (8) buyers do not normally contemplate the use of courts of the seller's state. *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*, 259 La. 635, 251 So.2d 45, 47 (1971). Thus , the court concludes, "[s]uch differences between interstate purchasers and interstate sellers support the conclusion that it would 'offend traditional notions of fair play and substantial justice' to allow foreign state to subject an out of state purchaser to its jurisdiction." 251 So.2d at 47.

We express no opinion with respect to the soundness of this distinction between nonresident sellers and nonresident buyers in Louisiana jurispurdence. We suggest, however, that the distinction between buyers and sellers should be only one factor in the due process analysis, a factor which may have a bearing on the quality of the defendant's contact with the forum. This is so because a nonresident seller who sells his product within the forum state may, depending on the facts of the case, more

Note 18 - Continued
purposefully avail himself of the benefits of the forum state than does a nonresident buyer who buys a product from within the forum state. The former may have significant, frequent and purposeful contacts with the forum in furtherance of its sales business, while the latter's contact may be but an isolated consumer purchase. Nevertheless, we suggest that the status of buyer or seller alone should not be determinative of the due process inquiry. It should be only one element which helps to describe the quality of the defendant's contact with the forum.

Finally, we point out that to the extent that the district court judge in the instant case relied on *Kalvar Corp. v. General Micrographics,* 318 So.2d 71 (La. App.), *writ refused,* 322 So.2d 773 (La. 1975), to determine whether the requirements of the Louisiana Long-Arm Statute have been met in this case, his reliance was improper. *See Standard Fittings v. Sapag, S.A.*, 448 F. Supp. 426, 429 n.4 (W.D.La. 1977). *Kalvar* was decided not on statutory grounds but on constitutional grounds. The Louisiana Court of Appeal in *Kalvar* states with some reluctance that the case was controlled by the principles set forth in *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.,* 259 La. 635, 251 So.2d 45 (1971). In *Riverland,* the Louisiana Supreme Court approved a more restrictive standard of minimum contacts for nonresident pruchasers, as compared to nonresident sellers. Although it mentioned other factors, the *Kalvar* court apparently found the defendant's status as a nonresident purchaser controlling in light of *Riverland* and affirmed the trial court's refusal to exercise jurisdiction. *Kalvar* is thus decisive neither of the statutory issue we face (because it was decided on constitutional grounds) nor of the constitutional issue we face (because its due process analysis apparently turned on defendant's status as a nonresident purchaser, a fact which we do not believe should be determinative, and because in any event, we deal with a nonresident seller).

Arm Statute permits the full due process exercise of personal jurisdiction over nonresident defendants.[19]

Having decided that the statutory inquiry is synonymous with the due process inquiry, we would ordinarily turn directly to the due process issue. We look first, however, to the Louisiana Court of Appeal's interpretation of the requirements of "transacting business" in order to assess the district court's conclusion that finalization of the contract in Louisiana is necessary under the Long-Arm Statute.

b. The Requirements of the Long-Arm Statute

We next consider the meaning of "transacting business" under the Louisiana statute. Specifically, we inquire whether "transacting business" requires, as the district court found, "finalization of the negotiation process." We hold that under Louisiana law it does not. In *Aucoin v. Hanson*, 207 So.2d 834, 836 (La. App.1968), the Louisiana Court of Appeal,

19. Our decision is not contrary to the holdings of, or even the dicta in, *Benjamin* and *Charia*. Any decision with respect to the reach of the Louisiana Long-Arm Statute in those cases would have been dicta because both cases were expressly based solely on the due process analysis. Moreover, the two cases did not even venture in dictum to say that the Louisiana Long-Arm Statute fails to exercise jurisdiction to the full due process limits, rather they said only that the issue was unclear.

construing § 13:3201 (a) in the context of a suit on a contract, held that "[t]he design of the Louisiana Long-Arm Statute was to reap the fullest benefit from United States Supreme Court cases in which the due process requirements under the federal constitution have been relaxed, as such pertain to personal jurisdiction in civil suits." The court held that the defendant had "transacted business" within the meaning of § 13:3201 (a) even though defendant's sole contact with the State of Louisiana was through an agent who apparently had no authority to contract on behalf of his principal. The agent carried out preliminary negotiations with the plaintiff in Louisiana. The contract was finally made between plaintiff and defendant in a telephone conversation. Its terms differed from those discussed by the plaintiff and defendant's agent. The court noted that it was as much a Mississippi contract as a Louisiana contract. Yet, despite the fact that defendant's agent had no authority to contract on behalf of defendant and the fact that "finalization of the negotiation process" occurred during an interstate telephone call between plaintiff and defendant, the court found that the defendant was transacting business within § 13:3201 (a).[20]

20. The Florida District Court of Appeals indicated that "transaction of business" occurs within the Louisiana Long-Arm Statute in the absence of "finalization of the negotation process" in *Fisher v. Premiere Realty Co.*, 298 So.2d 447 (Fla. Dist. Ct. App. 1974). There the court held that the three appellants, non-resident shareholders in a corporation, were transacting business under § 13:3201 (a) by virtue of having personally guaranteed performance of a lease between the corporation and the Louisiana plaintiff; the corporation had operated a restaurant for two years

We conclude that Louisiana courts have taken the position that "transacting business" under the Louisiana Long-Arm Statute does not require "finalization of the negotiation process".[21] Rather, the Louisiana courts have held that the Long-Arm Statute was intended to extend to the limits of due process. Business activity which will satisfy the requirements of due process will thus necessarily satisfy the "transacting business" requirements of the Long-Arm Statute. We, therefore, turn our inquiry to the requirements of due process.

2. Due Process

The district court found that Sapag's activities in Louisiana constituted a sufficiently minimal presence in Louisiana that it would be unfair to conclude that Sapag had given up its right to be sued only at its own domicile. Thus, the court found, appellant failed to show that the requirements of due process had been satisfied.

Note 20. - Continued
on the leased premises located in Louisiana. The court said,"[w]hen the three of them undertook to guarantee performance of the lease by the corporation, it is our view that they thereby appointed the corporation as their agent to carry out the terms of the lease in Louisiana and were personally transacting business in Louisiana." 298 So.2d at 449.

21. In our view, finalization of the agreement in Louisiana might have been a contact superior in quality to the actual contacts, taken singly, between Sapag and Louisiana. However, we conclude that such finalization is by no means necessary either to satisfy the requirements of the statute or to comport with due process.

The issue we must address was formulated in the Supreme Court case, *International Shoe v. Washington*, 326 U. S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). There the Court held that in order to subject a nonresident defendant to in personam jurisdiction, that defendant must have certain minimum contacts with the foreign state.[22] Said the Court, "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present with the territory of the forum, he have certain minimum contact with it such that the maintenance of the suit does not offend internal 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316, 66 S.Ct. at 158.

In *McGee v. International Life Insurance Co.*, 355 U. S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), the Supreme Court gave expression to another factor which bears on the question whether the nonresident defendant has sufficient minimum contacts with the forum state to permit the exercise of in personam

22. There is no particular formula for showing that the due process requirement that a defendant have minimum contact with the forum has been satisfied. Showing that a nonresident defendant is transacting business within the forum state is but one mode of showing that the nonresident defendant has sufficient minimum contacts to satisfy the due process clause. Thus "transacting business" is simply a term which is descriptive of the aggregate of activities which, in combination, satisfy the requirements of due process.

jurisdiction over him. That factor is the forum state's "interest in providing effective means of redress for its residents . . . ." *Id.* at 223, 78 S.Ct. at 201. The Court pointed out that the suit in *McGee* was "based on a contract which had substantial connection with that State [California]." *Id.* at 223, 78 S.Ct. at 201.

In *Hanson v. Denkla,* 357 U.S. 235, 78 S.Ct. 1228, 2L Ed.2d 1283 (1958), the Supreme Court drew back from its trend toward expanding power to exercise personal jurisdiction over nonresident defendants, refused to allow the exercise of personal jurisdiction and held:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule would vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253, 78 S.Ct. at 1239.

The Supreme Court has addressed the in personam jurisdiction problem most recently in *World-Wide Volkswagen*

Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). In *World-Wide,* the Court said, "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . [cite omitted] it has clear notice that it is subject to suit there and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on the customers, or, if the risks are too great, severing its connection with the State." 444 U.S. at 567, 100 S.Ct. at 567. And the Court noted further, "the foresee ability that is critical to due process analysis is . . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 567, 100 S.Ct. at 567.

Several cases in this circuit offer guidance. In *Benjamin v. Western Boat Building Corp.,* 472 F.2d 723 (5th Cir.), *cert. denied,* 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973), this court ruled: "while very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement, we have, nevertheless, unequivocally required *some* activity by the defendant before permitting the exercise of in personam jurisdiction under a state 'long-arm' statute, the jurisdictional touchstone being the presence of sufficient in-state business activity to indicate a purposeful enjoyment of the benefits and protections of that state's law." At 726. *See also Charia v. Cigarette*

Racing Team, Inc. 583 F.2d 184 (5th Cir.1978).[23]

23. In both *Benjamin* and *Charia,* this court found that in personam jurisdiction should not be exercised over the defendant because the requirements of due process were not satisfied. The fact situations in *Benjamin* and *Charia* are similar in some respects to the facts in the instant case: all three cases involve the efforts of a Louisiana plaintiff to assert jurisdiction over a nonresident in a contract dispute. Nevertheless, there are critical differences which distinguish those cases from the instant case. Both *Benjamin* and *Charia* involved the sale of a boat to a Louisiana resident by a nonresident boat builder. In *Benjamin,* the negotiations were by mail; the contract was executed by mail; although the nonresident defendant knew that the home port of the vessel would be in Louisiana, the forum state, the sale at issue was defendant's only sale to Louisiana, and defendant never made repairs to the boat in Louisiana; although defendant did advertise in national magazines which were circulated in Louisiana, this court found that contact insignificant in the absence of sales activities or advertising in local media; and finally the independent firm, which defendant arranged to inspect the boat after plaintiff's complaints, was found by this court not to be acting in an agency or employee capacity for defendant. The two additional facts which were present in *Charia* were: first, that the defendant arranged for the delivery of the boat to Louisiana, the forum state; and second, the defendant had sold three additional boats to Louisiana residents over a five-year period. In both cases, the court found the sales to Louisiana residents to be isolated sales which did not imply purposeful enjoyment of the benefits and protections of Louisiana law on the part of the nonresident defendants. The *Charia* court noted "[t]his is not a case where defendant had supplied its product to the forum state in large quantities over a lengthy period of time." 583 F.2d at 189.

The instant case, by contrast, involves an ongoing business relationship between Sapag and Standard Fittings, a relationship which contemplated continuing and substantial sales of Sapag's products and the management and operation of an exclusive distributorship for Sapag's products by Standard Fittings. In addition, Sapag representatives made three visits to Louisiana, two in furtherance of the business dealings between the parties, and the third involving a visit to another Louisiana company which resulted in Standard Fittings' learning that Sapag was interested in seeking an outlet for its products.

In *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974) [24] , this court described a two-part test for determining whether the exercise of in personam jusidiction would deprive a defendant of due process:"First, 'there must be some minimum contact with the state which results from an affirmative act of the defendant,' *i.e.*, purposeful activity. Secondly,' it must be fair and reasonable to require the defendant to come into the state and defend the action.' "495 F.2d at 494. In a footnote to this two-part test, the court identified several factors which various courts have used in determining

24. This court, in *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980), recently reaffirmed and again applied the principles expressed in *Product Promotions v. Cousteau.* In *Southwest Offset,* the plaintiff (Texas Printer, which "manufactured" telephone directories for defendant) sued defendant (Alabama publisher of telephone directories which purchased the printing services of the plaintiff) in Texas on a series of contracts. Finding the case controlled by Product Promotions, we reversed the district court's dismissal for want of personal jurisdiction. Although defendant Hudco operated in Alabama and Mississippi only and no one associated with Hudco ever came to Texas in connection with the orders placed with Southwest, we found that Hudco had sufficient contacts with Texas to make it amenable to the personal jurisdiction of Texas courts. Hudco's contacts with Texas included the following:

(1) Hudco placed repeated orders in writing or over the phone after Southwest's original solicitation of Hudco's business through Southwest's sales representatives in Alabama; the orders were accepted by Southwest in Texas; the contracts were governed by Texas law;

(2) Payment for the orders was to be made at Southwest's office in Dallas, Texas, and Hudco in fact mailed some payments to Dallas;

(3) As a part of the printing process, Hudco mailed to Southwest's office camera-ready copy of the telephone directories;

(4) Hudco returned corrected proofs to Southwest;

whether the exercise of personal jurisdiction over a nonresident corporation comports with due process: the quantity of contacts, the nature and quality of the contacts, the connection of the cause of action to the contacts, the interest of the forum state in providing a forum for its residents, the convenience to the parties, and the nature and character of business. 495 F.2d at 494 n.17.

Further explaining the first part of the two-prong test, the court in *Product Promotions* stated that purposeful activity of a defendant within the forum state implies that there must be *some* activity by the defendant and that it must "support an inference that the nonresident defendant purposefully availed himself of the benefits of conducting business in the forum." 495 F.2d at 495. The court went on to say that "even if the defendant performs no physical act within the State, activities outside the State can provide adequate contacts if they have reasonably forseeable consequences within the State." 495 F.2d at 496. And finally, with respect to the purposeful activity prong of the test, the court said, "[t]he operative consideration is that the defendant's contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise." 495 F.2d at 496.

Note 24 - Continued

(5) The books were printed and shipped to Hudco F.O.B. Dallas;

(6) All the directories which are the subject matter of this suit were printed in Texas and Hudco knew that Southwest's only printing plant was in Texas.

See also Gold Kist, Inc. v. Baskin-Robbins Ice Cream, 623 F.2d 375 (5th Cir. 1980).

Product Promotions refined the second prong of the test which demands that it not be "unfair or unreasonable to require the nonresident defendant to defend the suit in the forum." 495 F.2d at 497-98. Among the factors to be considered in evaluating this part of the test are "the interest of the state in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and basic equities." 495 F.2d at 498.

THE DECISION

Applying the foregoing principles, we hold that the activities of Sapag, in combination, bring Sapag within the boundaries of the Louisiana Long-Arm Statute and the principles of due process, and thus subject it to the jurisdiction of the Louisiana courts. We summarize Sapag's activities as follows:

(1) In late 1973, Sapag's Frederick and LeLievre visited another Louisiana company, seeking an outlet for Sapag products. As a result of that visit, Standard Fittings learned that Sapag was seeking an American outlet for its products;

(2) In January, 1974, Frederick mailed Sapag catalog and samples to Standard Fittings in Louisiana;

(3) An agreement, signed in Paris on February 19, 1974, was reached between the parties which contemplated continuing and substantial sales of Sapag products to Standard Fittings. It provided that Standard Fittings, which has its principal offices and manufacturing facilities in Opelousas, Louisiana, would become exclusive distributor of Sapag products in North America. As such, Standard would manage sales and distribution of Sapag products and Sapag would, at Standard's direction, ship its products anywhere in the world except Europe;

(4) Correspondence by letter and telex was exchanged between Frederick on Sapag's behalf and representatives of Standard Fittings subsequent to the Paris agreement;

(5) In June, 1974, Frederick visited the Standard Fittings plant in Opelousas;

(6) In February, 1975, Sapag's LeLievre and Patteeuw visited the Louisiana plant and discussed the agreement between Standard Fittings and Sapag and problems that had arisen in connection with that agreement;

(7) Sapag made delivery of some of its product pursuant to its agreement with Standard Fittings;

(8) Standard Fittings arranged for a bank letter of credit in favor of Sapag through a New Orleans, Louisana, bank.

These activities all related to the business relationship developed between Sapag and Standard Fittings and to the agreement which is the subject of Standard Fittings' suit. The

early activities of Sapag in Louisiana, including the Fall, 1973, visit to Louisiana by Sapag agents, were to promote its product. Later Sapag engaged in activities, including on two occasions activities by Sapag agents in the State of Louisiana, to further performance of the agreement with Standard Fittings and to negotiate difficuties that had arisen under the agreement. The agreement itself contemplated continuing and substantial sales of Sapag products. The agreement contemplated performance by Standard Fittings in Louisiana by payment to Sapag through a Louisiana bank and by management of the exclusive distributorship of Sapag products.

We hold that the nature and quality of these contacts—having as their purpose the establishment of the Louisiana based company as the exclusive distributor for Sapag's products in North America-reveal the kind of purposeful activity which has been held to constitute sufficient minimum contacts. Sapag has purposefully availed itself of the privilege of conducting activities in Louisiana. We are inescapably drawn to the conclusion that the agreement entered into and the combined activities of Sapag show that it "transacted business" in Louisiana within the meaning of the Louisiana Long-Arm Statute, and demonstrate sufficient minimum contacts with the State of Louisiana to justify the exercise of personal jurisdiction over Sapag under the due process analysis. Sapag reasonably should have anticipated being haled into court in Louisiana.

We hold, further, that it is not unfair or unreasonable to require Sapag to defend a suit in Louisiana. *See Product Pro-*

motions, Inc. v. Cousteau, 495 F.2d at 497-98. Sapag would have us believe that this dispute can only be litigated fairly in France. But we will not discount the interests of the Louisiana plaintiff so easily. Sapag, which has deliberately carried out business activities in Louisiana in connection with its avowed purpose of establishing an American corporation as an outlet for the distribution of its products in the U. S. and elsewhere in North America cannot insist that it is amenable to suit only in France. We acknowledge that France may well have an interest in providing a forum for resolution of the dispute between these two parties. Similarly, however, the United States, and particularly Louisiana, have an interest in providing a forum. The parties involved here operate substantial businesses. The agreement between Standard and Sapag contemplated many thousands of dollars worth of sales annually. The State of Louisiana clearly has an interest in providing a forum for litigating a breach of a major contract[25] which proposed to establish a Louisiana based company as the exclusive distributor in North America for Sapag's products.

While it may be less convenient for Sapag to defend this suit in Louisiana, we find no reason why such inconvenience to Sapag should outweigh the inconvenience to Standard Fittings of prosecuting the suit in France, in light of Louisiana's interest in providing a forum and Sapag's purposeful acts availing itself

25. We decline to attach special significance to the amount of damages at issue in this lawsuit, i.e., over $2,600,000. We note simply that the record shows that the agreement involved thousands of dollars worth of sales and a potential exclusive distributorship.

itself of the benefits of conducting business in Louisiana. *See Product Promotions v. Cousteau,* 495 F.2d at 495.[26]

The judgment of the district court dismissing the complaint against Sapag is accordingly

REVERSED AND REMANDED

26. We note in this regard that Sapag has sent agents to Louisiana on several occasions to further Sapag's business interests.

Appendix B-1

STANDARD FITTINGS COMPANY

v.

SAPAG, S.A.

Civ. A. No. 76-0473.

United States District Court,

W. D. Louisiana,

Opelousas Division.

Nov. 30, 1977.

RULING ON MOTION

NAUMAN S. SCOTT, Chief Judge.

This matter is before the court on a motion to dismiss for lack of in personam jurisdiction filed by SAPAG, S.A. (defendant). Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332.

Standard Fittings, a Louisiana domiciliary, alleges in its petition that the defendant, a French domiciliary, has breached an exclusive distributorship contract between the parties. Defendant denies plaintiff's contention as to the nature of the contract and avers that it was only an "agreement to agree" sometime in the future. In any event, interpretation of the agreement is not in issue at this time. The present inquiry relates specifically to defendant's motion to dismiss. Defendant's motion is predicated upon its contention that it is not amenable, under the Louisiana Long Arm Statute [1] and principles of constitutional due process, to the personal jurisdiction of a Louisiana tribunal.

1. L.R.S. 13:3201.

Factors giving rise to the presence or absence of in personam jurisdiction are insusceptible of general application and consequently must be analyzed upon the singular basis of their presentation to the court. *North Central Utilities, Inc. v. Consolidated Pipe & Supply, Inc.*, 62 F.R.D. 676 (W.D.La. 1974); *Drilling Engineering, Inc. v. Independent Indonesian American Petroleum* Co., 283 So.2d 687 (La.1973). The facts relevant to defendants' motion were determined from pleadings, memoranda, affidavits, attachments, and correspondence on file in the record.

The initial contact between the parties was made on January 22, 1974 when plaintiff's Sheldon Courville, in Opelousas, telephoned defendant's L.L. Fredrick in New Jersey and made inquiries about SAPAG products. As a result of this conversation certain catalogs of the defendant were sent to the plaintiff.[2] In February 1974 the President of Standard Fittings, Irwin Davlin, traveled to France and conducted negotiations with L. R. Guillemin and R. Patteeuw of SAPAG, which negotiations resulted in an alleged agreement that is object of this lawsuit. In March 1974 the office of plaintiff's K. E. Vreeland placed a call to Fredrick resulting in the shipment of more catalogs to the plaintiff. In June 1974

2. Letter from L . L. Fredrick to Sheldon Courville dated January 22, 1974.

Frederick visited plaintiff's factory in Opelousas, Louisiana; it is unclear what business, if any, was conducted on this visit.[3] In September 1974, Davlin returned to France, apparently to amend certain portions of the agreement. The agreement stipulated that SAPAG would ship the goods to Houston or New York, where title would shift to the plainttiff. The agreement also required Standard Fittings to obtain a letter of credit in favor of the defendant. This was done through a New Orleans bank. In February 1975 George Lelievre and R. Patteeuw visited the Standard Fittings plant in Opelousas for a day; it is unclear what business, if any , was conducted on this visit.

Plaintiff has the burden of proving jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L.Ed. 1135 (1936); *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723 (5th Cir. 1973). Unless a defendant possesses certain minimum contacts with a forum,

3. The status of L. L. Fredrick in his relationship with the defendant merits some attention. It appears from his affidavit and other material in the record that L. L. Fredrick was a "manufacturer's representative" who promoted the products of those with whom he contracted. His arrangement with SAPAG required him to expend 50 days a year in promotion of SAPAG products. However, it appears he possessed neither actual nor apparent authority to engage in substantive negotiations for SAPAG. This conclusion is borne out by the fact that Davlin journeyed to France to negotiate with SAPAG officers, rather than attempt to contract with Frederick.

the proper place of suit is his domicile. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *Riverland Hardwood v. Craftsman Lumber Co.*, 239 So.2d 465 (La. App. 1970). The contacts with the foreign forum must be such that "[defendant must] be found to have purposefully enjoyed the benfits and protection of Louisiana law." *Benjamin v. Western Boat*, at 729.

The vehicle whereby in personam jurisdiction is extended over foreign domiciliaries in Louisiana is the Louisiana Long Arm Statute, L.R.S. 13:3201(a):

> "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresidents (a) transacting any business in this state; . . "

As indicated above, the relating elements are a cause of action that arises out of the transaction of business in Louisiana. But this is only the threshold barrier. Another obstacle must be traversed before the defendant will be bound by a judgment in a foreign forum. The second barrier consists of constitutional due process considerations:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of the court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565. But

> now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a deffendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of the state." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 319, 66, S.Ct. 154, 158, 90 L.Ed. 95 (1945).

As the foregoing indicates, it is incumbent upon the court to initially determine if the present cause of action arose from the transaction of business within Louisiana. Once this is found, there must be a secondary determination made as to whether the imposition of in personam jurisdiction in Louisiana over the foreign defendant would transgress the bounds of due process. The scope of both are not coterminous. Thus the absence of one factor would preclude in personam jurisdiction regardless of the presence of the other. 2 Moore's Federal Practice § 4.25 (5).

Plaintiff, in Paragraph 2 of its petition, proffers a number of incidents which it contends constitute the transaction of business by the defendant in Louisiana:

> "SAPAG's contacts within the State of Louisiana include the following: (a) Defendant's representative, L. L. Fredrick, visited Opelousas, St. Landry Parish, Louisiana, on at least one occasion during 1974, to discuss the subject matter herein sued upon. (b) Goods manufactured by SAPAG were shipped into Opelousas, Louisiana, pursuant to the contract upon which the suit is based. (c) The contract upon which this suit is based contemplated that a substantial number of acts necessary to its performance would be done and carried out in Louisiana, including the placing of purchase orders, the payment for goods, and receipt of goods. (d) Defendant's representatives Messrs. LeLievre and Patteeuw conducted negotiations personally in Opelousas, Louisiana during 1975 which negotiations were in connection with the contract herein sued upon. (e) Defendant SAPAG has had repeated contact with Standard representatives in Opelousas, St. Landry Parish, Louisiana, by various forms of communication including mumerous telex messages, and various other forms of correspondence all of which was sent pursuant to the contract herein sued upon. (f) Remittance for goods shipped under this contract originated and was made upon banks in St. Landry Parish, Louisiana. (g) The acts described hereinabove are not intended to an exclusive list of the contacts of SAPAG within the State of Louisiana, but represent merely a sampling of contacts."

The above factors necessitate a decision by the court as to whether their existence consitutes a "transaction of business". Sections (e) and (f) relate to the transmission of correspondence between Louisiana and France, and the remittance for goods made through Louisiana banks. In the *Benjamin* case there were more than 50 instances of correspondence between Louisiana and Washington, and the planitiff there made 7 payments through New Orleans banks totaling $127,373.33 However, the court in Benjamin declined to characterize this activity as the transaction of business. *Benjamin* would also govern the letter of credit established by the plaintiff at the New Orleans bank. Section (c) is couched in the future tense and thus is inappropriate for present consideration. However, even if the acts in (c) had occurred, we do not believe their impact would exceed in consequence for our purposes those listed in (e) and (f). The agreement between the parties stipulates that SAPAG's performance by the shipment of goods would terminate by their delivery in Houston or New York. Hence, any presence in Louisiana of SAPAG manufactured products would be traceable solely to the actions of the plaintiff. We do not believe such unilateral action is valid basis upon which to confer jurisdiction. The capacity of L.L. Fredrick, specifically as it relates to his inability to contract on defendant's behalf has been previously discussed. This inability prohibits the conclusion that the occasion of Fredrick's visit to Opelousas resulted in the transaction of business. The visit of Messrs. LeLievre and Patteeuw to Opelousas provides the most significant incident in favor of finding jurisdiction. It is obvious

by correspondence subsequent to the visit that the business was discussed at that time. However, the Long Arm Statute is phrased in terms of "business transactions", not "business discussions".[4] The former presumes something more than mere discussion, rather it contemplated the finalization of a negotiation process. The only transaction apparent from the record is the agreement of 1974 with its supplement. Further, the affidavit of Lelievre states that no commercial transactions were consummated during the Opelousas visit and plaintiff has not afforded any substantive indication otherwise.

Since the facts, as presented to the court, display no transaction of business in Louisiana out of which the present cause of action arose, the Louisiana Long Arm Statute is an inappropriate vehicle for the imposition of in persomam jurisdiction over the defendant.

4. The case of *Kalvar v. General Micrographics, Inc.*, 318 So.2d 71 (La.App.1975), relates an incident remarkably similar to the present one. In *Kalvar*, the President of the non-resident defendant came to Louisiana to inspect the plant of the plaintiff, and the "contract terms and price were discussed." 318 So.2d at 72. However, the court in *Kalvar* noted that no formal agreement was confected during the Louisiana visit and subsequently held that no Long Arm jurisdiction would lie over the defendant in that case. The emphasis of *Kalvar* is vitiated somewhat by the fact that the defendant there was a non-resident buyer, whereas in the instant case we have a non-resident seller. Jurisprudential distinctions as to the acquistion of in personam jurisdiction over non-residents, based soley on their status as a buyer or seller, has been subject to criticism by Law Review commentators. 34 La.L. Rev. 691 (1974); 18 Loy.L. Rev. 452 (1972); 45 Tul.L. Rev. 1081 (1971).

The principle of consitiutional due process, as it relates to issues concerning non-resident parties to lawsuits is animated by a notion of fairness:

> "The governing principle is the fairness of subjecting a defendant to suit in a distant forum. Only if the nonresident defendant has such 'minimum contacts' with the state that the maintenance of the suit does not offend a traditional notion of fair play and substantial justice, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), or if the defendant has performed some act 'by which (it) purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws', *Hanson v. Denkla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), may this forum, consistently with due process, extend the Long Arm to embrace it." *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973).

As the above illustrates, there exists no series of objective touchstones whereby a court may declare, with complete assurance, that in personam jurisdiction over certain non-resident party exists or not. We believe it is left to the judgment of the court in each instance, to assess the activities of the non-resident in the forum jurisdiction, and to determine if those activities consitiute such a "presence" in the forum that it is not "unfair" to conclude that the non-resident has vouchsafed his

right to be sued only at his own domicile. The only incidents of real presence had by the defendant in Louisiana were the visits of L.L. Fredrick in June 1974 and the visit of Lelievre and Pat-teeuw in February of 1975. Is it fair to require a non-resident defendant to travel many thousands of miles to defend a suit because of a maximum of two days spent by its representatives in a foreign forum where no commercial transactions took place? We submit it is not.

We therefore conclude that the plaintiff has failed to display affirmatively the presence of in personam jurisdiction over the defendant, SAPAG, in this state. For the aforementioned reasons, it is hereby ORDERED, ADJUDGED AND DECREED that the motion to dismiss filed by defendant SAPAG be hereby GRANTED. Defendant should submit a judgment consistent with this ruling within five days of date hereof.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-3486

STANDARD FITTINGS COMPANY,

Plaintiff-Appellant,

versus

SAPAG, S.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION
FOR HEARING EN BANC

Opinion September 11, 1980

(October 30, 1980)

Before Gee, Tjoflat and Anderson, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rules 5 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

No. 80-1443

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAPAG, S.A., *Petitioner,*

v.

STANDARD FITTINGS COMPANY, *Respondent.*

BRIEF OF RESPONDENT STANDARD FITTINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 26, 1981

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No. 80-1443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAPAG, S.A., *Petitioner,*

v.

STANDARD FITTINGS COMPANY, *Respondent.*

BRIEF OF RESPONDENT STANDARD FITTINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Standard Fittings Company, respectfully submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied, and the cause should not be reviewed by this Court. In support of this submission, respondent files this Brief in Opposition pursuant to this Court's Rule 22.

This is a familiar type of jurisdictional dispute arising in the context of an action alleging breach of a commercial, exclusive distributorship contract [1] be-

[1] Petitioner disputes the characterization of the agreement as an "exclusive distributorship" contract. The Court of Appeals properly so characterized it. *E.g.*, 625 F.2d 630, 633, 643, 644, Pet. App. A-1, A-7, A-8, A-33, A-34, A-35.

tween a resident of the forum state (respondent) and a foreign entity (petitioner). *In personam* jurisdiction was based upon Louisiana's Long-Arm Statute.[2] The defendant-petitioner moved for dismissal of the action on the grounds that it is not amenable to the personal jurisdiction of a court in Louisiana under the Louisiana Long-Arm Statute and principles of constitutional due process (625 F.2d 630, 631, Pet. App. A-1). The District Court granted the motion, primarily on the basis of its construction of the Louisiana statute. (See *infra*).

The Fifth Circuit reversed (Anderson III, Gee and Tjoflat, JJ). It held that the requirements of both the Louisiana statute and due process were satisfied and remanded the cause for trial on the merits. Respondent submits that its decision should not be reviewed by this Court for the following reasons:

1. The petition, on its face, is fatally defective. As is shown by a mere comparison of the petition with the opinion of the court below, petitioner's "Statement of the Case" (Pet., pp. 3-7) omits essential facts, nor are these facts set forth elsewhere in the petition. *Cf., e.g.,* Pet. pp. 3-7, with the court's summary. 625 F.2d at 643-644, Pet. App. A-32—A-34. As provided by this

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[2] The Louisiana Long-Arm Statute in part reads as follows:

§ 3201. Personal jurisdiction over nonresidents.

A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

(a) transacting any business in this state;

(b) contracting to supply services or things in this state;

Because the Court of Appeals found that the requirements of subsection (a) were met, it did not address itself to subsection (b). See last paragraph, fn. 14, 625 F.2d at 637, Pet. App. A-15.

Court's Rule 21.5, this failure "to present with accuracy, brevity, and clearness" the relevant facts is "a sufficient reason for denying [the] petition".

2. The petition does not, in general terms, challenge the decision on due process grounds. The Questions Presented do not challenge the legal basis upon which the Fifth Circuit decided the case or its application of the law to the facts. Petitioner states two "Questions Presented". Neither question is presented by the case before this Court. Neither relates to an issue decided by the court below, either expressly or by implication.

a. The first Question Presented assumes that the court below decided that personal jurisdiction "is constitutionally justified by the fact" that the resident plaintiff secured a letter of credit from a forum bank in favor of the foreign defendant. The court below did not so decide. It held that personal jurisdiction was appropriate on the basis of the totality of relevant facts.

b. The second Question Presented (although it is far from clear) erroneously states that the court below somehow attached special weight to Louisiana's interest in the controversy, and requests this Court to determine "what kind or degree of interest in the controversy must the forum state have" before that interest supports the exercise of personal jurisdiction. (See, *e.g.*, Pet., p. 20). The court below did not refer to or rely upon any special or "particularized interest" of the forum state beyond a state's conventional right and, indeed, its obligation to make its courts available to its citizens in appropriate cases. Nor is there any requirement of law that a state must have a "particularized interest".

This Court's Rule 21.1 provides that only the questions set forth in the petition for a writ of certiorari or fairly included therein will be considered by the Court. Since the only questions presented herein are obviously and facially inappropriate for consideration by the Court, the petition should be denied.

3. The decision of the court below as to the construction of the Louisiana Long-Arm Statute is clearly correct and mandated by decisions of the Louisiana courts and other Louisiana authorities, and, in any event, the question of local law is inappropriate for review by this Court. 625 F.2d 637-641, Pet. App. A-14—A-25.

4. The decision below is essentially factual and represents a sound application of established principles of law to the facts of this case. There is no reason why the writ should be granted; there is no federal question which has been decided in a way which conflicts with any decision of this Court, and there has been no departure from the accepted and usual course of judicial proceedings.

5. The case does not present a conflict with any decision of any Court of Appeals.

THE FACTS

In view of petitioner's defective statement, an abbreviated summary of the relevant facts found by the court below is appropriate (625 F.2d at 643-644, *passim*, Pet. App. A-32—A-36, *passim*).[3]

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[3] Petitioner does not contest any of the findings of the court below relevant to the jurisdictional issue. In its petition to this Court petitioner does not mention visits of petitioner's officers and agents to Louisiana and their activities in the state to promote

1. Petitioner is a manufacturer in France of high-pressure fittings, valves, unions and other items. Respondent is engaged in the manufacture, purchase, sale and distribution of the same types of products. Respondent's plant and principal offices are in Opelousas, Louisiana. 625 F.2d 631, Pet. App. A-1.

2. In late 1973, the French sales manager of petitioner (LeLievre) and its United States marketing consultant and representative (Frederick) traveled to Louisiana soliciting business on behalf of petitioner (625 F.2d 632, Pet. App. A-4—A-5) and seeking a distributor for petitioner's products in America. As a result of petitioner's visit to another company in Louisiana engaged in the business, respondent learned of petitioner's interest and communicated with petitioner's marketing consultant who mailed petitioner's catalog and samples to respondent. —No mention of these facts is made in the petition.

3. An agreement between petitioner and respondent was signed in Paris on February 19, 1974, in the course of a visit by respondent's chief executive to petitioner's offices in Paris. This provided for purchase and sale of petitioner's products and contemplated that respondent would become exclusive distributor of petitioner's products in the United States. It also provided that petitioner would ship its products at respondent's direction anywhere in the world except Europe.

4. After various exchanges of correspondence, in June 1974, petitioner's representative, Frederick, visit-

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their products and arrange for a distributor thereof, and to discuss and settle matters which arose with respect to performance of the contract. These are of obvious and cardinal significance to the decision below and are summarized in the Fifth Circuit's opinion.

ed respondent's plant in Opelousas, Louisiana. In February 1975, petitioner's French sales manager (Le Lievre) and another of its French officials (Patteeuw) visited respondent in Louisiana and discussed the agreement, the performance thereunder, and problems which had arisen. 625 F.2d 633-634, Pet. App. A-8—A-10. —No mention of these activities of petitioner in Louisiana is made in the petition.

5. The agreement contemplated continuing and substantial sales of petitioner's products, and significant sales and deliveries were in fact made prior to the alleged breach of the agreement by petitioner.

6. The agreement provided that payment for petitioner's products sold under the contract would be made by letter of credit issued by an acceptable North American bank. Respondent arranged for such letter of credit to be issued by a Louisiana bank, and petitioner accepted the designation of the Louisiana bank and requested that the letter of credit issued by the Louisiana bank be renewed upon its expiration. —The only reference to the letter of credit in the court's opinion appears in a summary listing of petitioner's activities and a brief reference thereto in the following paragraph. 625 F.2d 644, Pet. App. A-33—A-34. Petitioner's request that the letter of credit with the Louisiana bank be extended appears in the record. Letter of LeLievre to Davlin, March 10, 1975.

THE OPINIONS BELOW

The District Court, reviewing the documentary evidence and affidavits, held that it did not have *in personam* jurisdiction of the petitioner. It reached this conclusion essentially on the basis of its construction

of the Louisiana Long-Arm Statute, specifically, L.R.S. 13:3201(a), which sets forth one of the bases upon which personal jurisdiction over a non-resident may be exercised: namely, "as to a cause of action arising from the nonresident's (a) transacting any business in this state". The District Court held that this provision required "the finalization of a negotiation process" in Louisiana (448 F.Supp. 426, 429-430, Pet. App. B-8). Primarily because the contract between the parties was not "finalized" in the state, but was executed in Paris, the District Court held that the requirement of the statute for *in personam* jurisdiction was not satisfied. The District Court's only point with respect to the due process requirement was that the relevant "principle of constitutional due process", "is animated by a notion of fairness" and that in the present case "it is not 'unfair' to conclude that the non-resident has vouchsafed his right to be sued only at his own domicile". 448 F.Supp. 430, Pet. App. B-9—B-10.[4]

On appeal, the Fifth Circuit, carefully reviewing Louisiana decisions and authorities, held that the District Court's construction of the Louisiana law was erroneous. It held that the phrase "transacting business" under the Louisiana statute does not require, as the District Court found, "finalization of the negotiation process". On the contrary, citing numerous Louisiana precedents and authorities, it held that Louisiana decisions have established that its Long-Arm Statute "was intended to permit the exercise of *in personam* jurisdiction to the full limits of due process" (625 F.2d 638 ff., Pet. App. A-17 ff.), and that "Business

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[4] As the Fifth Circuit's opinion demonstrates, the District Court totally failed to refer to or note various significant contacts and activities of the non-resident petitioner in the forum state.

activity which will satisfy the requirements of due process will thus necessarily satisfy the 'transacting business' requirement of the Long-Arm Statute".[5]

Turning to the due process requirement, the Fifth Circuit reviewed the criteria established by this Court as essential to subject a non-resident defendant to *in personam* jurisdiction,[6] and it reviewed its own prior decisions on the subject. 625 F.2d 641-643, Pet. App. A-25—A-32. It summarized petitioner's activities, and held that "in combination", those activities "bring Sapag [petitioner] within the boundaries of the Louisiana Long-Arm Statute and the principles of due process. . . ." 625 F.2d 643, Pet. App. A-32. Specifically, it held that "sufficient minimum contacts" with the state were demonstrated; that "Sapag reasonably should have anticipated being haled into court in Louisiana"; and that "it is not unfair or unreasonable to require Sapag to defend a suit in Louisiana", particularly in light of "Sapag's purposeful acts availing itself of the benefits of conducting business in Louisiana". 625 F.2d 644-645, Pet. App. A-35—A-36.[7] Accordingly, it reversed the District Court's decision and remanded the cause for trial.

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[5] The court's careful review of the Louisiana authorities appears at 625 F.2d 638-641, Pet. App. A-14 - A-25. A leading Louisiana case is its Court of Appeal's decision in *Aucoin* v. *Hanson*, 207 So. 2d 834, 836 (La. App. 1968) (625 F.2d 640, Pet. App. A-23 ff.).

[6] *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *McGee* v. *International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199 (1957); *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958); *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980).

[7] Although not specifically noted by the court below, the delays of civil litigation in the French courts are common knowledge.

ARGUMENT

1. The "Non-Issues" Stated by the "Questions Presented"

At the outset, we submit that the petition herein is fatally defective under this Court's Rules. It purports to state two "Questions Presented".[8] The first "Question Presented" is "Whether the exercise of personal jurisdiction over a foreign defendant is constitutionally justified by the fact that the plaintiff, a resident of the forum state, unilaterally chose to secure a letter of credit from a forum bank in favor of the foreign defendant?" --No such issue is presented. It is not remotely possible to read the Fifth Circuit's opinion as a holding that, standing alone, the obtaining of a letter of credit in the forum state, under whatever circumstances, justifies *in personam* jurisdiction. The letter of credit transaction in the present case was merely one of many factors found by the court as establishing "in combination" the facts necessary to sustain jurisdiction. It does not appear in any way that the court attached special importance to the letter of credit or that its absence would have induced a different result.[9]

Much of petitioner's submission is devoted to argument attempting to support this non-issue as to the letter of credit. Petitioner erroneously argues, on the purported basis of the Ninth Circuit's decision in *Thos. P. Gonzalez Corp.* v. *Consejo National de Produccion*

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[8] Rule 21.1(a) states that "Only the questions set forth in the petition or fairly included therein will be considered by the Court".

[9] There is factual justification in this case for considering the letter of credit issued by a Louisiana bank to be an activity of petitioner in the forum state because respondent arranged for it at the reiterated request of petitioner to assure payment, that selection of the Louisiana bank was approved by petitioner, and that petitioner requested its extension. (*Supra*).

de Costa Rica, 614 F.2d 1247 (9th Cir. 1980), that there is a conflict between the Ninth and Fifth Circuits as to the significance, for due process purposes, of a letter of credit obtained from a forum bank. In *Gonzalez,* there were no "contacts" of defendant in the forum state except, arguably, the circumstances relating to the letter of credit. Additionally, the facts concerning the letter of credit were fundamentally different from those in the present case. In *Gonzalez,* the non-resident defendant did not itself contract for, cause or approve the issuance or more accurately, the "confirmation" of the letter of credit by a bank in the forum state.[10] Indeed, the facts in *Gonzalez* and the present case are so different that, even if it could rationally be said that the present case decides a point of law concerning the significance of letters of credit (which is not the case), it could not plausibly be urged that the two cases represent a conflict justifying review by this Court.

The second "Question Presented" by petitioner is a request that this Court decide "what kind or degree of interest in the controversy must the forum state have before that interest becomes a factor properly supporting the exercise of personal jurisdiction?" It is not possible to ascertain with any assurance the point that petitioner is seeking to make. At times petitioner seems to argue that the court below "improperly attaches jurisdictional significance to Louisiana's interest in this controversy". No such inference can be

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[10] As the Ninth Circuit found in *Gonzalez*, the defendant (a Costa Rican agency) "made payment [for purchased grain] by having its bank in Costa Rica issue letters of credit which [a bank in the forum state] confirmed, although the contracts specified only that payment be by letter of credit in United States or Costa Rican currency". (614 F.2d at 1249).

drawn from the court's opinion. The only references to Louisiana's "interest" are in terms of Louisiana's general interest (like that of all states in instances where jurisdiction is appropriate) "in providing a forum for litigating a breach of a major contract which proposed to establish a Louisiana based company as the exclusive distributor in North America for [petitioner's] products". 625 F.2d 644, Pet. App. A-35. It is in this general context that the court refers to *McGee* v. *International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199 (1957): that is, as authority for a state's exercising *in personam* jurisdiction over a non-resident to vindicate its "interest in providing effective means of redress for its residents . . ." where the suit is "based on a contract which had substantial connection with that State". 625 F.2d 641, Pet. App. A-26—A-27.

Alternatively, petitioner may be saying that this Court has required that a state must have a special or "particularized interest" in the cause in order to exercise personal jurisdiction over a non-resident, and it may be requesting this Court to define that "particularized interest". (See Pet. 17 (caption), 20). Petitioner invokes *Kulko* v. *Superior Court of California,* 436 U.S. 84, 98 S.Ct. 1690 (1978), apparently asserting that *Kulko* requires that a state must have a "particularized interest" in order that it make its courts available to its residents in suits against non-residents. *Kulko,* of course, does not so hold. On the contrary, it holds that *despite* California's significant interest in the controversy (relating to support of children resident in California), there was an absence of the minimum contacts necessary to sustain personal jurisdiction against the non-resident defendant. —We know of no case, in fact, which requires a "particularized in-

terest" in the forum state, other than the state's general interest in the welfare of its residents, in order to sustain the state's action in making its courts available to its residents in controversies with foreign residents, where appropriate in accordance with due process requirements.

2. The Construction of Local Law

Petitioner does not challenge the Fifth Circuit's ruling as to the construction of the Louisiana Long-Arm Statute. Obviously, that ruling would not and does not present an issue for review by this Court. Accordingly, we briefly note (see *supra*) that the Fifth Circuit overruled the District Court's conclusion that Section 13:3201(a) of the Louisiana Long-Arm Statute requires that the "negotiation process" must be "finalized" in the state in order to provide a basis for personal jurisdiction over a non-resident defendant. 448 F.Supp. 429, Pet. App. B-8. Since the agreement of the parties was executed in Paris, the District Court held that this requirement was not satisfied.[11] The Fifth Circuit, on appeal, after a comprehensive analysis of Louisiana cases and authorities, held that this was error; that the phrase "transacting business" "does not require finalization of the neogtiation process"; and that "The Louisiana courts have repeatedly stated without qualification that § 13:3201 was intended to extend to the limits of due process". Its conclusion is clearly correct. 625 F.2d 637-641, Pet. App. A-14—A-25.

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[11] As the Fifth Circuit noted, the District Court did not consider whether *in personam* jurisdiction was justified by L.R.S. 13:3201(b) relating to "contracting to supply services or things in this state". (See *supra*).

3. Due Process: The Decision Below is Correct and Presents No Reason for Review by this Court [12]

The opinion below, as we have shown, is based upon a sound application of the conventional due process standards: the existence of requisite minimum contacts so that maintenance of the suit does not offend traditional notions of fair play and substantial justice; the defendant purposefully avails itself of the privilege of conducting activities within the forum state; the foreseeability "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"; and the "fairness" of subjecting the foreign defendant to defense of the action in the forum state in view of the nature and quality and purposefulness of its activities therein. 625 F.2d 641-646, Pet. App. A-25—A-32.

The court below, recognizing that its "inquiry into the applicability of the Louisiana Long-Arm Statute and the due process implications . . . is a fact sensitive one", properly and carefully applied these standards to the facts of this case. 625 F.2d 631, Pet. App. A-2. In brief, it demonstrated that the requirements of law were satisfied by the facts that petitioner came to Louisiana "to promote its product" and to seek to make an arrangement in that state by which a resident therein would undertake the functions of American distributor of its merchandise; that it engaged in activities "to further performance" of the agreement by its distributor in Louisiana and resolve difficulties which had arisen, "including on two occasions activities by [petitioner's] agents in the State of Louisiana"

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[12] The petition herein does not seek review on the due process issue generally, but because it is fundamental to Long-Arm cases, we briefly discuss it.

(625 F.2d 644, Pet. App. A-34); that the agreement contemplated "continuing and substantial sales" by the distributor in Louisiana of petitioner's products and, in fact, significant performance took place prior to the alleged breach; and that performance was contemplated and in fact occurred by "management [in Louisiana] of the exclusive distributorship of [petitioner's] products" (625 F.2d 644, Pet. App. A-34), and "payment to [petitioner] through a Louisiana bank" pursuant to the agreement and with respondent's approval and upon its request. On this basis, the court below held that "the nature and quality of these contacts—having as their purpose the establishment of the Louisiana based company as the exclusive distributor for [petitioner's] products in North America—reveal the kind of purposeful activity which has been held to constitute sufficient minimum contacts. . . . [Petitioner] reasonably should have anticipated being haled into court in Louisiana". The court then proceeded to "hold, further, that it is not unfair or unreasonable to require [petitioner] to defend a suit in Louisiana" in view of the circumstances, particularly petitioner's intention and activities "to establish a Louisiana based company as the exclusive distributor in North America" for its products. 625 F.2d 644, Pet. App. A-34—A-35.[13]

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[13] We suggest that it is particularly appropriate that Long-Arm Statutes be available to residents of a state who, by contract, undertake the obligations of an exclusive distributorship of the products of a foreign supplier. As here, the resident distributor, by agreement with the non-resident undertakes a continuing and substantial obligation, substantially performable in the forum state, to promote the supplier's product—sometimes, as here, in competition with the distributor's own products. Breach of the arrangement, after the resident has invested in promoting the non-resident's

CONCLUSION

For the foregoing reasons, respondent submits that this cause should not be reviewed by this Court and the petition should be denied.

Respectfully submitted,

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products, has a severe and sometimes destructive impact upon the resident's business in the forum state for which accessible remedy is essential. In these circumstances, remitting the injured distributor to suit in a foreign jurisdiction [France] provides an incentive to the non-resident to terminate, transfer or take over the distributorship after the resident has established a market for the products. This type of situation does not present the difficult and subtle balancing of considerations present, for example, in ***World-Wide Volkswagen, supra.***